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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1334

MILTON SILVERMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 430 F.2d 106 (2nd Cir. 1970). The unreported opinion of the District Court is reproduced as Appendix D to this Petition.

JURISDICTION

The initial judgment of the Court of Appeals was entered on July 1, 1970. (Appendix B). A timely motion for rehearing and rehearing en banc was denied in an order entered December 11, 1970. (Appendix C). A timely application for an extension of time in which to file this petition was granted by Mr. Justice Harlan on January 5, 1971. The time to file was extended to and including February 9, 1971. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the traditional attorney-client privilege precludes compelled disclosure in a federal criminal trial of portions of a confidential opinion prepared by an attorney for the defendant where the opinion related to the minutes of a labor organization said to be "public records," and where the opinion is used by the Government to prove that the minutes had been altered in violation of 29 U.S.C. § 439(c).

2. Whether a federal indictment alleging, in the language of 29 U.S.C. § 501(c), that the defendant embezzled funds of certain labor organizations of which he was an officer, is defective under Rule 7(c), Fed. R. Crim. Proc., and the Fifth and Sixth Amendments, because it failed to allege an essential ingredient of the crime not mentioned in § 501(c), i.e., that the labor organization is engaged in an industry affecting interstate commerce.

3. Whether a defendant can be convicted for embezzlement of union funds, in violation of 29 U.S.C. § 501(c), by requiring him to prove that the funds were lawfully expended and without requiring the Government to prove beyond a reasonable doubt that the funds in question were expended by the defendant for non-union purposes.

4. Whether the petitioner received a fair trial by an impartial jury as guaranteed by the Fifth and Sixth Amendments.*

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* Although not relied upon as a reason for granting the writ, in the event certiorari is granted petitioner reserves the right to argue that the judgment below should be reversed on the grounds that he did not receive a fair trial as guaranteed by the Fifth and Sixth Amendments. The grounds for this assertion were discussed by the Court of Appeals at App. 29a-36a.

STATUTES AND RULE INVOLVED

This case involves 18 U.S.C. § 664, numerous sections of Title 29 U.S.C., and Rule 7(c) of the Federal Rules of Criminal Procedure. These provisions are set forth in Appendix E to this Petition.

STATEMENT OF THE CASE

Petitioner, Milton Silverman, an officer of two local unions and the trustee of the Welfare and Pension Funds maintained for the benefit of the members of those local unions, was convicted on an indictment which purported to allege violations of federal laws regulating labor unions and employee welfare funds. The indictment was in 18 counts. The jury convicted Silverman on 16 counts, and the Court of Appeals reversed on 8 counts, so that convictions on 8 counts survive.*

During 1965 and 1966 petitioner was president of a local union known as Local 810 of the entity known as International Brotherhood of Teamsters; business manager of another local union known as Local 1614 of the entity known as International Brotherhood of Electrical Workers; and a trustee and administrator of the United Wire, Metal and Machine Welfare Fund and Pension Fund. In 1968 petitioner was indicted by the Grand Jury on an indictment which read as follows:

> ### Counts One Through Thirteen
>
> The Grand Jury charges:
>
> On or about the dates hereinafter set forth in the Southern District of New York, Milton

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*A majority (Friendly and Hays, JJ.) reversed on 8 counts. Judge Moore voted to affirm all 16 convictions.

SILVERMAN, the defendant, unlawfully, wilfully and knowingly, directly and indirectly, did embezzle, steal, abstract and convert, to his own use, and the use of another, monies, funds, securities, property and other assets of a labor organization of which he was an officer and by which he was employed, to wit, Local 810, International Brotherhood of Teamsters and Local 1614, International Brotherhood of Electrical Workers, as hereinafter set forth.

Count	Date	Amount
1	October 27, 1965	$2581.37
2	November 29, 1965	581.38
3	January 31, 1966	500.00
4	February 16, 1966	300.00
5	March 24, 1966	400.00
6	April 20, 1966	400.00
7	May 24, 1966	200.00
8	June 21, 1966	200.00
9	July 2, 1966	1200.00
10	December 7, 1965	2000.00
11	December 7, 1965	2000.00
12	December 13, 1966	2000.00
13	December 13, 1966	2000.00

(Title 29, United States Code, Section 501(c), Title 18, United States Code, Section 2)

COUNT 14 [*sic*]

The Grand Jury further charges:

On or about the 18th day of July, 1968 in the Southern District of New York, MILTON SILVERMAN, the defendant, unlawfully, wilfully and knowingly did embezzle, steal, abstract and convert to his own use and the use of another, moneys, funds, property and other assets, to wit, one thousand dollars, of an employee welfare benefit plan, to wit, the United Wire, Metal and Machine Health and Welfare Fund, 10 East 15th Street, New York, New York.

(Title 18, United States Code, Section 664)

COUNTS FIFTEEN THROUGH SEVENTEEN

The Grand Jury further charges:

On or about the dates hereinafter set forth in the Southern District of New York, MILTON SILVERMAN, the defendant, unlawfully did make false statements and representations of material facts, knowing them to be false, in documents and reports required to be filed with the Secretary of Labor under the provisions of Title 29, United States Code, Sections 431 through 440, in that MILTON SILVERMAN, the defandant, who was then and there President of Local 810, International Brotherhood of Teamsters, did state in Form LM-2, Labor Organization Annual Reports hereinafter set forth that the amounts hereinafter set forth were true, correct and complete to the best of his knowledge and belief, whereas in truth and in fact, as the defendant then and there well knew, said amounts were not true, correct and complete to the best of his knowledge and belief.

Count	Report Ending	Item No.	Total Reported	Part of Total Falsely Reported
15	December 31, 1965	58	$29,835.00	$2500.37
16	December 31, 1965	69(d)	8,620.00	2000.00
17	December 13, 1966	69(e)	19,905.00	2000.00

(Title 29, United States Code, Section 439(b).)

(Title 18, United States Code, Section 2.)

COUNT EIGHTEEN

> The Grand Jury further charges:
>
> From on or about the 1st day of January, 1965 to on or about the 31st day of December 1966, in the Southern District of New York MILTON SILVERMAN, the defendant, unlawfully, wilfully, and knowingly did cause false entries to be made in books, records, reports and statements, to wit, the cash book, minute book and general ledger, of a labor organization engaged in an industry affecting commerce, to wit, Local 810, International Brotherhood of Teamsters, and Local 1614, International Brotherhood of Electrical Workers required to be kept by said labor organization pursuant to Title 29, United States Code, Section 436.
>
> (Title 29, United States Code, Section 39(c) [*sic*])
>
> (Title 18, United States Code, Section 2)

In March 1969, trial before a jury was held in the District Court for the Southern District of New York. Jurisdiction was based on 18 U.S.C. § 3231. Upon the convictions on Counts 1-15 and Count 18, the court imposed sentences of a $1,000 fine on each count, concurrent sentences of four months imprisonment on Counts 1-15 and a consecutive sentence of four months on Count 18.

At the trial, petitioner argued that Counts 1-17 * of the indictment were fatally defective because they failed to allege an essential element of the crimes purportedly charged—that the local unions involved were "engaged in an industry affecting [interstate] commerce . . . . " 29 U.S.C. § 402(a)(i); see also

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* The error affecting Counts 16 and 17 is mooted by the acquittal of petitioner thereon.

18 U.S.C. § 664, 29 U.S.C. §§ 302(1), (10)-(11), 303 (a). All of the laws involved in these counts are regulations of labor union activity based on the Federal Government's power to control interstate commerce. Petitioner, the Government, and both lower courts agree that proof that the labor organizations are engaged in an industry affecting interstate commerce is an essential element of the crimes sought to be charged in Counts 1-15. It was also agreed that allegation of every essential element was necessary. Both courts below held, however, that such an allegation could be supplied by implication. Petitioner contends that a direct, specific allegation in the indictment itself is required.

After verdict petitioner moved in arrest of judgment, on the basis of the insufficiency of the indictment. (Ex. A163).* The trial judge denied the motion and in an opinion held that the indictment was sufficient. (App. D). Petitioner also moved for a judgment of acquittal or, in the alternative, a new trial. (Ex. A160). This motion was also denied. An appeal was taken to the Second Circuit Court of Appeals.

On appeal petitioner urged *inter alia* that the trial court erred in denying the motion in arrest of judgment. Petitioner contended that specific allegations in the indictment of every essential element were constitutionally required under the Fifth and Sixth Amendments for three distinct reasons: First, because in compliance with the Sixth Amendment he was entitled to be informed of the issues to be tried;

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* Parenthetical references to "Ex." are to the volume entitled "Exhibits and Related Documents" filed in the Court of Appeals. References to "T." are to the three-volume trial transcript filed in that Court. Parenthetical references to "App." are to the appendix to this petition.

second, because in compliance with the Fifth Amendment he was entitled to be protected against the possibility of double jeopardy; and, finally, because in compliance with the Fifth Amendment he was entitled to be tried only on an indictment returned by a grand jury. Petitioner contended that there was absolutely no indication that the grand jury had considered the interstate commerce element in connection with Counts 1 through 17 of the indictment and that it had concluded there was probable cause to believe that each of the unions was engaged in an industry affecting interstate commerce. This contention was rejected by the Court of Appeals.

Silverman further contended that the evidence on Counts 1-8 and 10-13 was insufficient to support the verdicts. A majority of the Courts of Appeals agreed as to Counts 1-8 and ordered reversal of those convictions, but affirmed the convictions on Counts 10-13. Petitioner contends that the Government did not produce *any* evidence indicating he embezzled the funds involved in Counts 10-13. In essence he has been convicted on the basis of no evidence at all, thereby nullifying the constitutional requirement that the prosecution must prove its case beyond a reasonable doubt and instead requiring the defendant to prove his innocence.

Silverman also argued that the conviction on Count 18 rested on evidence improperly admitted in violation of the attorney-client privilege and that this prejudicial evidence tainted the entire case. Count 18 charged that Silverman made false entries in union books. Although the indictment itself was rather general and open-ended, the Government at trial narrowed this charge and concentrated on an alleged falsification of union minute books. (T. 1100-03).

Before trial Local 810 had been served with a subpoena to produce its minutes and record books. Prior to submitting these records to the Grand Jury, petitioner and the union retained an attorney, Jacob Friedland, and requested him to examine records and give legal advice thereon. Friedland submitted the requested opinion in May, 1967. Upon learning of the existence of this opinion, the prosecution obtained a subpoena duces tecum requiring its production before the Grand Jury. The union moved in the District Court to quash the subpoena on the grounds that the opinion was a confidential communication protected by the attorney-client privilege. (Ex. A18) After taking testimony and hearing arguments the Court (Murphy, J.) granted the motion, and in an opinion stated:

> We have read the report and are satisfied that it refers to legal advice and opinion from lawyer to client and as such, is not subject to production before the grand jury. The government argues, however, that such protection disappears if the purpose is to further a criminal enterprise or fraudulent act. In this connection, the government has exhibited to us some grand jury testimony but we reject this *ex parte* proof. Accordingly, the motion to quash is granted, without an adjudication being made as to the alleged illegal purpose of such report. Ex. A76-77.*

At trial the Government tried to show that the union records actually submitted to the Grand Jury had been altered. An F. B. I. documents expert testified that one page in each of two 1965 union minute books was typed on a typewriter different from that used to prepare the other pages. (T. 584). One of those two pages showed an approval by Local 810 of a $2,000 loan to petitioner. The prosecution also called Friedland to the stand and asked him about his investigation of the records in 1967. Friedland initially refused to testify, claiming that his investigation and the opinion given the union were confidential and privileged. After stating and restating a number of rationales for the admissibility of the document, the trial court eventually ruled that the attorney's opinion was not privileged. In so ruling the Court (Palmieri, J.) in effect overruled the prior decision of Judge Murphy. After he was granted immunity from prosecution, Friedland proceeded to testify. He examined a copy of his opinion and testified on the basis of that examination that when he reviewed the minutes in 1967 there was no approval of Local 810's loan to Silverman. The Court then admitted into evidence that portion of the attorney's opinion which indicated the absence of any authorization. The government pointedly brought the grant of immunity to the jury's attention, (T. 979), and the Court again referred to the grant in its charge to the jury. (T. 1167) Throughout these proceedings the trial court repeatedly stated that there was no evidence of any collusion or conspiracy to commit a crime between Friedland and the petitioner. (T. 613-614, 620, 621). A finding of collusion would have warranted applying the only recognized exception to the attorney-client privilege. In spite of the absence of any basis for this exception, the court concluded that Friedland's opinion was not privileged and was properly admitted into evidence. The Court of Appeals upheld the trial judge's ruling.

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* On reargument Judge Murphy adhered to his ruling and held "in order for the attorney-client privilege to disappear, it must be shown that the purpose of the communication was to aid in the commission of a crime. . . . No such showing has been made here." (Ex. A79).

The Court of Appeals could find no prejudicial error in the efforts of the prosecution to portray the petitioner as a suspiciously wealthy (Tr. 909), tax-evading (Tr. 1094A-1094B) labor dictator in the mold of "Adolf

Hitler" (Tr. 1095), who wasted union money on cigars (Tr. 285, 533-35). Nor could the court discover any error in the prosecutor's repeated suggestions before the jury that those union officials and associates who testified against petitioner had to be "dragged" before the court with grants of immunity before they would testify. (Tr. 979, 1079, 1094A, 1100, 1102-1104). These prosecutorial tactics were sustained even though a majority concluded the "trial seems to have been characterized by a degree of overkill on the part of the prosecutor. . . ." (App. 40a). The petitioner's objections to the Government's cross-examination of petitioner's witnesses as to his prior arrest record were rejected by the Court of Appeals on the theories that (a) the trial judge had not abused his discretion in allowing such queries, and (b) the petitioner was allowed to establish that the arrests had not resulted in convictions, though he was precluded from showing that the arrests were wholly baseless.

Petitioner applied for rehearing in the Court of Appeals. That petition was denied, but the Court of Appeals took the unusual step of deleting a substantial portion of the opinion relating to the attorney-client privilege issue, thus indicating considerable uncertainty as to the validity of its decision on this point. (Appendix C).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONSTITUTES A DRASTIC AND DANGEROUS DEPARTURE FROM THE ACCEPTED UNDERSTANDING OF THE ATTORNEY-CLIENT PRIVILEGE.

The decision below approves an invasion of the traditional attorney-client relationship on the premise that a labor attorney's opinion prepared for his client is not confidential to the extent that it merely describes certain union committee minutes as they appeared when presented to him by the client. That decision has repercussions far beyond the scope of this criminal proceeding or indeed beyond federal criminal procedure in general. If unreviewed and unreversed, the decision will impose most serious limitations on the ability of all individuals to seek and obtain legal advice from their counsel free from fear of disclosure to adverse parties.

The convictions in this case rest in large part on the Friedland opinion. That document was admittedly "legal advice and opinion" prepared by an attorney for the union and the petitioner, as Judge Murphy specifically found. As such, petitioner contends the document is absolutely privileged and cannot be introduced in a judicial proceeding without the express consent of the clients. In this case, both the union and the petitioner strenuously objected to the receipt in evidence of the document and the testimony by the attorney concerning its contents.

The Court of Appeals overruled this contention and, in doing so, invented a dangerous, unprecedented "exception" to the traditional attorney-client privilege. That Court concluded that the opinion was not privileged because it concerned the contents of "public records." The Court reasoned that the minute books submitted to the attorney were "public records of the union" by virtue of the Landrum-Griffin Act, (App. 26a), and that an attorney's opinion concerning the contents of these records is not privileged.

This conclusion is simply wrong. To begin with, the Second Circuit's notion that the minutes of the Local 810 executive committee meeting are "public records" is highly questionable. The court's supporting reference to 29 U.S.C. §§ 431(c) and 436 does not indicate that Congress clothed such minutes with a public aura. Section 431(c) does make "available" to the members of a labor organization any report that the organization has filed with the Secretary of Labor pursuant to subsections (a) and (b)—i.e., constitutions, by-laws and financial reports that are made "public information" under 29 U.S.C. § 435(a). Section 431(c) further provides that the labor organization must make available to its members who have "just cause" therefor "any books, records, and accounts necessary to verify" the reports and documents on file with the Secretary of Labor. And under 29 U.S.C. § 436, the labor organization must keep for five years the "necessary basic information and data from which the documents filed with the Secretary may be verified."

But nowhere is there any legislative directive that the minutes of a union meeting or of an executive committee meeting be deemed "public information." At most such minutes might be deemed among the records or "basic information and data" which might, for just cause, be made available to union members or to the Secretary of Labor under his investigative powers mentioned in 29 U.S.C. § 521. To deem such minutes "public records" is to pervert the careful limitations imposed by the Landrum-Griffin Act on the availability of such matters and to open a host of problems with respect congressional control and regulation of labor organization activities.

In any event the Court of Appeals' assertion that the Friedland opinion did not disclose a confidential communication is erroneous. Introduction of the opinion in evidence did not simply convey to the jury an idea of the contents of the records when examined by an attorney. The opinion, coupled with the alleged "public record," conveyed to the jury the idea that the attorney had either conspired with the defendant to commit a crime, or had advised the defendant that he had committed a crime. In this case the prosecution intentionally tried to lead the jury to such an implication by pointedly asking Friedland whether he would have testified if he had not been granted immunity. (T. 979). This question, without any cautionary instructions from the court, necessarily encouraged the jury to think the defendant and his lawyer were engaged in some illegal activity. Such improper implications are the type of considerations that have led to the development of the attorney-client privilege.

The traditional attorney-client privilege is based on constitutional considerations. The Sixth Amendment guarantees criminal defendants a right to counsel. That right is meaningless unless the defendant is completely free to discuss each and every detail of the case with his lawyer, free from fear that his discussions will eventually be used against him at the trial. Such assurance can only be given by the lawyer when there is an absolute privilege not to disclose any of the discussions, communications, advice or opinions rendered by the attorney during the course of his employment. Full and frank discussion should not be expected if the attorney must tell his client that their communications are privileged, "except in certain vaguely defined circumstances." An absolute privilege against disclosure is essential to preservation of the constitutional right to counsel.*

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* In certain respects, this argument is similar to that of the respondents in *United States* v. *Caldwell*, No. 1114 Oct. Term 1970, cert. petn. filed December 16, 1970. In that case the Court of Appeals for the Ninth Circuit held that a newspaper reporter could not be compelled to appear before a Grand Jury in order

The attorney-client privilege has Fifth Amendment aspects as well. An attorney is legally regarded as an extension of his client. Since the client cannot be compelled, in a criminal case, to testify against himself, the same result should not be permitted indirectly through compulsory disclosure of communications between the attorney and his client.

In this case the prosecution was allowed to introduce a part of the attorney's opinion prepared for his client. According to the courts below, this part was not privileged, but implicitly the remainder of the opinion was privileged and could not be disclosed without the consent of the clients. Allowing such piecemeal introduction of otherwise privileged documents will provide the prosecution a dangerous incentive to search through an attorney's files looking for "opinions based on public records." Such investigations would destroy the attorney-client privilege and might often provide the prosecution with otherwise unobtainable leads to the development of their case. In essence the defendant and his attorney would become unwilling aids of the prosecution. Indeed, by viewing out of context a seemingly innocent reference to a "public record," a jury can conclude that it was written in response to a most incriminating inquiry and thus impinge upon the privilege.

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to disclose certain facts relating to a story he had researched and published in a newspaper. The Court of Appeals' decision rested on a belief that the full and free discussion and freedom of the press guaranteed by the First Amendment could not be protected without an absolute privilege of news reporters not to disclose the sources of their information. Just as the "newsmen's privilege" furthers the goals of the First Amendment, so the attorney-client privilege furthers the purposes of the Sixth Amendment.

Congress was fully aware of the traditional attorney-client relationship when it enacted the Landrum-Griffin Act and indicated a general desire that nothing in the Act be construed to interfere with that relationship. *See* 29 U.S.C. § 434.* By sanctioning the invasion of that relationship in this criminal proceeding, the Second Circuit has appreciably undermined this express congressional policy.

The Court of Appeals was unable to cite any prior authority supporting its position. The reason for this void is simple. Until this case, it was universally assumed that the attorney-client privilege applied to all communications between an attorney and his client. The absence of any supporting authority is a clear indication of the extent to which the Court of Appeals in this case departed from accepted judicial principles, particularly when that Court later took the unusual step of deleting a major portion of the opinion dealing with this issue. Such a radical departure from "the accepted and usual course of judicial proceedings" requires the exercise of this Court's power of supervision. Rule 19.1(b), Sup. Ct. R.

We respectfully submit that regardless of whether the minutes come within the definition of "public records," the prosecution had no right to introduce the opinion because its effect was to breach the attorney-client relationship and inflame the jury against the defendant.

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* "Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434.

II. THE DECISION BELOW IS NOT ONLY ERRONEOUS BUT IN CONFLICT WITH OTHER DECISIONS AS TO THE VALIDITY OF AN INDICTMENT THAT OMITS AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.

An unyielding rule of federal criminal jurisprudence was stated by Mr. Justice Field for the Court in *United States* v. *Hess,* 124 U.S. 483, 486 (1888): "No essential element of the crime can be omitted [from the indictment] without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially or by way of recital." See also *Russell* v. *United States,* 369 U.S. 749, 765 (1962); *Ex parte Bain,* 131 U.S. 1 (1887).

Any failure to allege such an essential element renders the indictment void and deprives the trial court of jurisdiction over the defendant. *United States* v. *Norris,* 281 U.S. 619, 622-623 (1930). This type of jurisdictional defect is considered "far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone* v. *United States,* 361 U.S. 212, 217 (1960). So substantial a denial of constitutionally required procedure "cannot be eradicated under the guise of technical departure from the rules." *Smith* v. *United States,* 360 U.S. 1, 9 (1959); see also *Williams* v. *District of Columbia,* 419 F.2d 638, 648 (D.C. Cir. 1969). Reversal of a conviction premised on so defective an indictment is necessary to assure that a defendant is tried only when the essential elements of a crime are charged by the grand jury, as required by the Fifth Amendment.

The Second Circuit's decision in this case represents a troubling and serious departure from the basic notion that the indictment as returned by the grand jury must allege *all* the essential elements of the crime attributed to the defendant. The courts below, the Government and the petitioner are all in agreement that one of the critical elements of a crime under § 501(c) is that the affected labor organization be one "engaged in an industry affecting interstate commerce." No such allegation was made in the first 17 counts of this indictment. The Second Circuit's strained attempt to cure that omission by implication, by resort to "terms of art," and by reference to other portions of the indictment not unexpectedly has produced conflicts with decisions of this Court and of other Courts of Appeals. Thus it becomes appropriate for this Court to review this serious erosion of the cardinal principle that no one can be held to answer to a charge of a serious crime in the federal courts except when the grand jury has charged him with *all* the essential elements of a crime.

A. The Decision Below Conflicts With That of the Fifth Circuit in Walker v. United States, 342 F.2d 22 (1965).

In *Walker* v. *United States,* 342 F.2d 22 (5th Cir.) cert. denied, 382 U.S. 859 (1965), the indictment charged that the defendant "did unlawfully, wilfully and knowingly, with intent to defraud, utter and publish . . . as true the falsely forged name of the true payee . . . on the back of the United States Treasury check described in Count 1 of this indictment, well knowing said endorsement to be forged, in violation of Section 495, Title 18 U.S.C.A." *Id.* at 26. The statute required that the acts be done "with intent to defraud *the United States.*" 18 U.S.C. § 495 (emphasis added). On appeal, for the first time, the defendant argued that the indictment was insufficient since it did not specifically allege an intent to defraud "the United States." The Court of Appeals reversed the convictions, stating:

> "It is obvious from a mere reading of these counts that there is no allegation that the acts charged were done with an 'intent to defraud the United States'. While it may be said that to defraud the United States is implied, the essential elements of a crime cannot be implied in an indictment." *Id.* at 26-27.

In the instant case the indictment on Counts 1-13 alleged only that petitioner "did embezzle . . . assets of a labor organization of which he was an officer, . . ." The indictment then identified the specific local unions involved and set forth a list of the dates and amounts involved in each count. At the end of this list a parenthetical reference to 29 U.S.C. § 501(c) was given, as required by Rule 7(c) of the Federal Rules of Criminal Procedure. Similarly, Count 14 charged that the petitioner had embezzled funds "of an employee welfare benefit plan," named the specific plans involved, and concluded with a citation to 18 U.S.C. § 664. So again Count 15 alleged that Silverman had unlawfully made false statements "in documents and reports required to be filed with the Secretary of Labor" under 29 U.S.C. §§ 431-440. Clearly the indictment itself does not specifically allege any connection with interstate commerce. The Court of Appeals, however, ruled that the indictment was sufficient since "[a]n indictment must be read to include facts which are necessarily implied by the specific allegations made." (App. 6a). Apparently the court concluded the bare words "labor organization" implied the broader meaning of "labor organization engaged in an industry affecting interstate commerce" a definition found only in 29 U.S.C. § 402, a provision not in any way referred to in the indictment, even parenthetically. This process of construing an indictment by "implication" was clearly rejected by the Fifth Circuit in *Walker*.

The indictment in *Walker* neglected to include the words "the United States." The indictment in the instant case neglected to include the words "engaged in an industry affecting interstate commerce." The indictment in *Walker* did contain a specific reference to the statute in which the missing words appeared. The indictment in the instant case contained no such reference. Here the indictment referred to 29 U.S.C. § 501(c). The definition of "labor organization" is contained in § 402 of Title 29. Thus the indictment in the instant case was less specific than in that *Walker* since this indictment did not even refer to the statutory provision upon which the Court of Appeals relied.

The Court of Appeals attempted to distinguish *Walker* by stating that there was no allegation in that case from which "the essential element in question could be necessarily implied." (App. 7a, n.3.). The attempted distinction is unpersuasive. The defendant in *Walker* forged a name on a United States check and then cashed it. It is far easier to imply use of the words "the United States" from the words used in the *Walker* indictment than it is to supply the element missing from the indictment in this case.*

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* In *United States* v. *Psoinos Construction Co.*, 282 F.Supp. 473 (D. Mass. 1968) Chief Judge Wyzanski dismissed an indictment returned under § 302 of the Labor Management Relations Act, 29 U.S.C. § 186, which makes it unlawful for an employer to deliver or pay money to any labor organization which represents "any of the employees of such employer who are employed in an industry affecting [interstate] commerce." The indictment failed to allege

B. The Decision Below Conflicts With the Decision of This Court in United States v. Carll, 105 U.S. 611 (1881).

In part the Court of Appeals concluded that the terms "labor organization" and "employee welfare fund" were "terms of art." The court reasoned that both phrases were defined in the statutes and that these definitions removed any ambiguity and sufficiently alleged the interstate commerce element. Such reasoning was rejected by this Court in *United States* v. *Carll,* 105 U.S. 611 (1881), where the Court stated:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, *unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity,* set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." (Citations omitted.) (Emphasis supplied.) *Id.* at 612-613. See *Russell* v. *United States, supra,* at 765.

A tortous, legalistic, triple implication—from a statutory citation in the footnote of the indictment to the text of § 501(c) which contains terms defined only in

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that the employees represented by the labor organization specified in the indictment were themselves employed in an industry affecting commerce.

Chief Judge Wyzanski ruled that since it was possible that the employees were not employed in an industry affecting commerce, "the indictment fails to charge the offense denominated by the statute." In the court's words, "In short, there is missing an essential element requisite under the statute." *Id.* at 474.

other provisions not mentioned in the indictment or the footnote—cannot be held to represent the full, direct, express and unambiguous utterance of the grand jury.

C. The Decision Below Is Clearly Erroneous.

Petitioner's contention is that the challenged portions of the indictment fail to disclose that the *grand jury* considered the commerce issue and concluded there was probable cause to believe that the local unions were in fact engaged in an industry which affected interstate commerce. Nothing in the Court of Appeals' decision refutes that argument. One commentator in an article devoted extensively to an analysis of the instant case has already noted "that the result reached [below] is incorrect." Note, *Indictment Sufficiency,* 70 Col. L. Rev. 876, 899 (1970).

The Court of Appeals reasoning is based on definitions contained in sections of the United States Code not cited in the indictment. At best this reasoning suggests that a person trained in the law and armed with a copy of the Code and the indictment might conjecture that the indictment was using shorthand expressions which by definition included an element of interstate commerce. Nothing in this syllogism indicates that the grand jury, a body of laymen probably not even aware of the United States Code, followed this maze to its conclusion and based its indictment on that conclusion.

At one point in the opinion the Court of Appeals noted that Count 18 specifically alleged a connection with interstate commerce and concluded that "[i]t would be absurd to think that the grand jury could have found such a fact on count eighteen and could have been in ignorance of it when they indicted on the other counts." (App. 9a). This statement overlooks the possibility that the grand jury never considered the interstate aspects in connection with the first 17 counts since the members never knew they were supposed to consider that issue on those counts.

Moreover any reliance on the specific allegation in Count 18 to supply the missing allegations in the other counts would clearly conflict with decisions of the Seventh Circuit Court of Appeals. See *United States* v. *Pierce,* 275 F.2d 318, 324 (7th Cir. 1960); *United States* v. *Gordon,* 253 F.2d 177, 179-180 (7th Cir. 1958). The Court of Appeals apparently recognized the inevitable conflict and therefore disclaimed reliance on Count 18. (App. 9a, n.4.). Count 18 is thus completely irrelevant to consideration of the sufficiency of the indictment on Counts 1-15, and the indictment remains devoid of any reference to interstate commerce in connection with these counts.

III. THE DECISION BELOW SUSTAINING THE SUFFICIENCY OF THE EVIDENCE ON COUNTS 10-13 IN EFFECT SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT IN VIOLATION OF THE DUE PROCESS CLAUSE AND IN CONFLICT WITH DECISIONS OF THIS AND OTHER COURTS.

A. The Decision Below Requires the Defendant To Prove His Innocence.

Counts 10-13 involved four checks, each for $2,000 which petitioner received at Christmas-time in 1965 and 1966. Petitioner contended that these checks were issued pursuant to a long-standing union tradition of providing him funds to be used in giving Christmas bonuses to deserving members. Evidence of specific authorization by the union of the checks was introduced. Conceivably, however, the jury could have disbelieved this evidence and concluded that there was no such practice and no valid authorization.

Petitioner himself testified that the proceeds were expended for the unions' benefit through distribution to certain individuals. The Government introduced no evidence at all on the actual distribution of these funds. The jury could have disbelieved petitioner's explanation, but in that event the evidence introduced would show only that the funds were received; there was no alternative explanation of how they were spent.

A majority of the court below held that the Government was required to prove "that the defendant . . . ha[d] taken [the union's] property or cause it to be taken, knowing that the [union] would not have wanted that to be done." (App. 37a-38a). The court further held that this burden was met simply by a demonstration "that Silverman received money that belonged to the union, expended that money and did not file vouchers to show the use to which the money was put." (App. 19a). The court reasoned that only Silverman could "supply the information to fill the gap in the union records created by the absence of voucher." (*Id.*) The court then made the erroneous conclusion that the jury's disbelief of Silverman's explanation was in and of itself sufficient evidence that the funds were spent for a non-union purpose. This conclusion is not only completely illogical, it in effect transfers the burden of proof to the defendant and required him to prove that the funds *were* spent for a union purpose, rather than requiring the Government to prove that they were not.

This result is contrary to the principle recently recognized in *In re Winship,* 397 U.S. 358, 364 (1970), that the Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."* As was said in *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958), "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." But here the Second Circuit has rejected those basic concepts by imposing on petitioner the burden of demonstrating that the funds in question were spent by him for a lawful purpose. So cavalier an error deserves review and repudiation by this Court.

It is significant that neither with respect to Counts 10-13 nor with respect to any of the other counts on which petitioner was convicted did the Second Circuit purport to review the judgment of guilt in terms of the constitutional requirement that there be proof of guilt beyond a reasonable doubt. Not once in its opinion does the court mention that requirement or ostensibly review the supporting proof on that basis. As to Counts 10-13, for example, the court concluded, in terms pertinent to review of a civil negligence verdict, that "we find the verdicts of guilty on counts ten through thirteen are supported by the evidence and that the jury could have concluded that the amounts involved were either retained by Silverman or used to maintain his own hegemony over the two locals." (App. 21a).

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* The result below conflicts with the dissenting views of Mr. Justice Black in *Winship,* as well as those of the majority in that case. Although Justice Black does not believe the Constitution requires proof beyond a reasonable doubt, he agrees that in a *federal* criminal case proof beyond a reasonable doubt is required. See *Winship, supra* at 385-386; *Turner* v. *United States,* 396 U.S. 398, 430 (1970) (Black, J. dissenting).

The result below reflects the long standing but highly questionable rule in the Second Circuit under which an appellate court will not review the evidence to determine whether it is sufficient to meet the "beyond a reasonable doubt" test. In that circuit if there is evidence to support each element of the crime, regardless of how little the evidence, and if the proper words about reasonable doubt have been uttered to the jury, the conviction will be sustained. See, e.g., *Looker* v. *United States*, 240 Fed. 932 (1917); *Gilson* v. *United States*, 258 Fed. 588, *cert. denied* 251 U.S. 555 (1919).

Perhaps it is that failure to insist upon proof beyond a reasonable doubt that explains the Second Circuit's otherwise inexplicable imposition on a criminal defendant of the burden of proving a lawful expenditure. If so, the need for review and correction by this Court is even greater.

B. The Decision Below Conflicts With the Decision of the Third Circuit in United States v. Lynch, 366 F.2d 829 (1966).

The Court of Appeals for the Third Circuit in *United States* v. *Lynch*, 366 F.2d 829 (1966), held that proof of embezzling union funds requires the Government affirmatively to demonstrate that funds received by the defendant were converted to his own use or the use of another. In that case the defendant was accused of embezzling a certain union initiation fee. The defendant admitted that he collected the money and contended that he turned it over to another person. The Government proved that the union books recorded neither the name of the initiate nor any receipt of the initiation fee. The Court of Appeals set aside the judgment of conviction, saying:

> ". . . the prosecution must have shown, not only that Lynch collected the $170, which was an initiation fee, belonging to the local, but that he wilfully converted it to his own use. See *Taylor* v. *United States,* 320 F.2d 843, 850-851 (C.A. 9, 1963). There was no direct proof that he retained the $170. The prosecution maintains the jury was free to infer that Lynch wilfully converted the $170 payment to his own use from the circumstances under which he received the money and the fact that the local's membership records did not mention Anthony Gentile, the name of the waterfront worked who paid the money to Lynch, or note any receipt of the $170. . . . Under the circumstances we think that the inference that Lynch converted the money to his own use is one which the jury should not have been permitted to draw because it was too tenuous." *Id.* at 830-831 (footnotes omitted).

The *Lynch* case clearly requires that conviction of embezzling union funds must be supported by affirmative evidence indicating the defendant disposed of funds to his own and not the unions' use. A mere showing of receipt of money without any showing of ultimate disposition is insufficient to support a conviction for embezzling those funds.

CONCLUSION

For the foregoing reasons the petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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February 9, 1971

APPENDIX

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 494 and 561—September Term, 1969.
(Argued January 26, 1970 Decided July 1, 1970.)
Docket Nos. 33584 and 34392

UNITED STATES OF AMERICA, *Appellee*,
—against—
MILTON SILVERMAN, *Defendant-Appellant*.

Before:
MOORE, FRIENDLY and HAYS, *Circuit Judges*.

Consolidated appeals from a judgment of conviction entered April 25, 1969 in the United States District Court for the Southern District of New York after a trial before Edmund L. Palmieri, *Judge*, and a jury and from an order entered December 12, 1969 by Julge Palmieri, denying a motion for a new trial on the basis of newly discovered evidence. The indictment contained eighteen counts charging embezzlement from, and falsification of records and reports of, two union locals and a welfare fund in violation of 29 U.S.C. §§ 501(c), 439(b),(c) (1964) and 18 U.S.C. § 664 (1964).

Affirmed as to all counts except counts one through eight which are reversed.

Moore, *Circuit Judge:*

Milton Silverman appeals from his conviction on an eighteen-count indictment and from the denial of his motion for a new trial. The first eight counts of the indictment charged Silverman with the conversion of union funds which were paid to printing companies for the benefit of a political campaign. Count nine involved an expenditure of union funds by Silverman at a union convention. The next four counts (ten through thirteen) charged payments of union funds to Silverman for his use in awarding "Christmas gratuities." Count fourteen charged embezzlement of the proceeds from the sale of an asset of an employee welfare fund. Count fifteen involved the reporting on a Labor-Management Report of the political printing expenditure in count one. False reporting was also charged in counts sixteen and seventeen, involving the payments described in counts ten through thirteen. The final count charged the making of false entries in the books and records of the unions.

The jury found Silverman guilty on all counts except counts sixteen and seventeen. Silverman was sentenced to four months to be served concurrently on counts one through fifteen and four months to be served consecutively on count eighteen. He was also fined $1,000 on each of the sixteen counts upon which he was found guilty.

The facts as to each of the counts (except counts nine anl fifteen as to which no challenge to the sufficiency of the evidence is made) will be more fully discussed below. It is sufficient for purposes of introduction to give a general background only. In 1965 and 1966 Milton Silverman was President of Local 810, International Brotherhood of Teamsters; Business Manager of Local 1614, International Brotherhood of Electrical Workers; and a Trustee and the Administrator of United Wire, Metal and Machine Welfare Fund and United Wire, Metal and Machine Pension Fund. These four affiliated labor organizations had common headquarters in Manhattan and were governed by interlocking slates of officers. The organizations had grown out of a predecessor founded by Silverman twenty-four years earlier. Local 810 had a membership of 10,000 and Local 1614 had 3,500 members. They had collective bargaining agreements with approximately 300 employers in New York and New Jersey. Local 810 had net assets of about $200,000 while Local 1614 carried a deficit of around $51,000. Each local shared in the joint welfare fund, which had assets of $10 million, and the joint pension fund, which had assets of $6 million.

The Sufficiency of the Indictment

Silverman argues that the convictions on counts one through fifteen of the indictment must be reversed because (1) these counts failed to state an offense, (2) the court lacked jurisdiction and (3) the court allowed an impermissible amendment to the indictment. These arguments are based upon the proposition that the indictment failed to allege that the unions were involved in interstate commerce. The indictment, tracking the language of the statute,[1] states that:

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[1] 29 U.S.C. § 501(c) (1964) provides:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

29 U.S.C. § 402 (1964) supplies definitions which are applicable to terms used in the Labor-Management Reporting and Disclosure Act. Subsections (i) and (j)(1) provide in pertinent part:

> " 'Labor organization' means a labor organization engaged in an industry affecting commerce . . . ."

> "A labor organization shall be deemed to be engaged in an industry affecting commerce if it—(1) is the certified representa-

> "[T]he defendant, unlawfully, wilfully and knowingly, directly and indirectly, did embezzle, steal, abstract and convert, to his own use, and the use of another, monies, funds, securities, property and other assets of a labor organization of which he was an officer and by which he was employed, to wit, Local 810, International Brotherhood of Teamsters and Local 1614, International Brotherhood of Electrical Workers, as hereinafter set forth.
>
> [Dates and amounts involved in counts one through thirteen omitted]
>
> (Title 28, United States Code, Section 501(c), Title 18, United States Code, Section 2)"

> tive of employees under the provisions of the National Labor Relations Act . . . ."

Counts fourteen and fifteen of the indictment are alleged to be subject to similar charges of error. Count fourteen follows the statutory language in 18 U.S.C. § 664 (1964). That section provides:

> "As used in this section, the term 'any employee welfare benefit plan or employee pension benefit plan' means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act."

The Welfare and Pension Plans Disclosure Act provides, at 29 U.S.C. § 303(a) (1964), that it applies to

> "any employee welfare or pension benefit plan if it is established or maintained by any employer or employers engaged in commerce or any industry or activity affecting commerce or by any employee organization or organizations representing employees engaged in commerce or any industry or activity affecting commerce or by both."

Count fifteen alleges a violation with respect to documents required to be filed with the Secretary of Labor under the provisions of 29 U.S.C. §§ 431-440 (1964). It is provided by 29 U.S.C. § 431(b):

> "Every labor organization shall file annually with the Secretary [certain financial reports therein described]."

The definition of "labor organization" is given above.

There is no dispute that there was sufficient proof of the requisite connection with interstate commerce. It was established that both unions were certified representatives of employees under the provisions of the National Labor Relations Act. Pursuant to 29 U.S.C. § 402(j)(1), this fact requires that the unions shall be deemed labor organizations engaged in an industry affecting commerce. Nor is there any dispute that the jury was properly charged that it must find the unions to be labor organizations engaged in an industry affecting commerce in order to return a verdict of guilty.

Rule 7(c) of the Federal Rules of Criminal Procedure requires that the indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." This requirement performs three constitutionally required functions. It permits the accused "to be informed of the nature and cause of the accusation" as required by the Sixth Amendment. It prevents any person from being "subject for the same offense to be twice put in jeopardy of life or limb" as required by the Fifth Amendment. Finally, it preserves the protection given by the Fifth Amendment from being "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." 8 Moore, Federal Practice ¶ 7.04 at 7-15 (1969). On Appeal, Silverman does not protest that the first two of these functions have not been fulfilled. He was adequately informed of the specific accusations and thus able to prepare his defense. The crime was stated definitely enough to permit a plea of former jeopardy if the acts were made the subject of a later charge. However, he contends that the third function has not been fulfilled. Invoking the legal history of the grand jury as a buffer against tyranny, he states that an allegation of each essential element of a crime must be in the indictment "as a testament to its having been before the grand jury." Applt's Brief at 21.

The policy underlying the requirement of specificity in the indictment is similar to that which forbids the amendment of an indictment without resubmission to a grand jury. It is to prevent the usurpation of power by the court and prosecutor in allowing a defendant to be convicted "on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell* v. *United States*, 369 U.S. 749, 770 (1962). This policy is effectuated by preventing the prosecution from modifying the theory and evidence upon which the indictment is based. See generally, 8 Moore, Federal Practice ¶7.05[3]. The question presented on this appeal is whether the indictment reveals that all the essential elements for conviction were presented to the grand jury, and deliberated upon and charged by them. We must also decide whether the prosecutor has attempted to rely at the trial upon theories and evidence that were not "fairly embraced in the charges made in the indictment." *Russell* v. *United States*, 369 U.S. 749, 793 (1962) (Harlan, *J.*, dissenting).

The indictment uses the term of art, "labor organization," and then specifies two particular labor organizations by referring to Locals 810 and 1614.[2] An indictment must be read to include facts which are necessarily implied by the specific allegations made. *United States* v. *Martell*, 335 F.2d 764, 765-66 (4th Cir. 1964); *United States* v. *Varlack*, 225 F.2d 665, 669-70 (2d Cir. 1955); *Hewitt* v. *United States*, 110 F.2d 1, 5-6 (8th Cir.), *cert. denied*, 310 U.S. 641 (1940); *Hager* v. *United States*, 285 U.S. 427, 431-33 (1932); *Grant* v. *United States*, 291 F.2d 746, 748-49 (9th Cir.), *cert. denied*, 368 U.S. 999 (1961); *Gonzales* v. *United States*, 286 F.2d 118, 120 (10th Cir.), *cert. denied*, 365 U.S. 878 (1960); *Finn* v. *United States*, 256 F.2d 304, 306-07

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[2] A similar term of art is used in count fourteen ("employee welfare benefit plan").

(4th Cir. 1958).[3] Just as the use of the words "labor organization" in the statutory section defining the criminal offense involved necessarily implies the fact that the labor organization is engaged in an industry affecting commerce pursuant to 29 U.S.C. § 402(i), so the use of that term of art in the indictment necessarily implies that the essential element of interstate commerce is charged in the indictment. To contend otherwise would be to argue that the defendant was not sufficiently informed of the charges against him to allow preparation of a defense and that he could not be protected from being later placed in jeopardy for the acts. Such arguments are concededly not presented by this case since Silverman was not prejudiced in such a manner. We must conclude that the indictment, as drafted, was sufficient to charge the essential element of interstate commerce.

Even though the indictment is drafted to charge the essential elements, the question remains whether on its face it presents evidence which assures us that such essential elements were presented to the jury and deliberated upon them in returning the indictment. Cf. *Russell* v. *United States,* 369 U.S. 749, 770-71 (1962). The presence of such evidence would insure that the defendant is not tried upon a theory or evidence which was not fairly embraced in the facts upon which the grand jury based its charges. The events described in the indictment were quite specific as to the dates of the transactions, the amounts involved and the parties from whom the funds were taken. Such allegations were sufficient to guard against giving improper discretion to the court and the prosecutor to vary the trial proof from the theory upon which the indictment was based. This is not a case wherein the indictment alleged facts showing one violation of federal law (interference with interstate importation of sand) and proof was allowed at trial of another violation (interference with interstate importation of steel). *Stirone* v. *United States,* 361 U.S. 212 (1960). A situation similar to *Stirone* would be presented if the indictment had alleged that Silverman was an officer of Local 810 only and a conviction were permitted on proof that funds of Local 1614 had been embezzled. Nor is this a case wherein the grand jury might have relied upon specific evidence showing a violation of federal law (deception of the Comptroller of the Currency) which the trial judge permitted to be stricken from the indictment at trial. *Ex parte Bain,* 121 U.S. 1 (1886). A situation similar to *Bain* would be presented if the trial judge had amended the indictment at trial to delete reference to one of the two Locals. No one could suppose that the prosecutor would be free to roam at large in proving elements of the crime so explicitly stated. This statement is also true with respect to the allegation of interstate commerce. The connection with interstate commerce upon which the indictment must rest is that the specific unions named were "labor organizations" in the statutory sense. The specification of the unions involved protects Silverman from the evils of facing charges not made before the grand jury.

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[3] We distinguish *United States* v. *Cox,* 285 F. Supp. 367 (E.D. Wisc. 1968) and *Welker* v. *United States,* 342 F.2d 22, 26-27 (5th Cir.), *cert. denied,* 382 U.S. 859 (1965), cited by the defendant, upon the ground that there was no allegation present in those cases from which the essential element in question could be necessarily implied. We do not regard *United States* v. *Pearce,* 275 F.2d 318, 324 (7th Cir. 1960) or *United States* v. *Gordon,* 253 F.2d 177, 179-80 (7th Cir. 1958) to be contrary to the result here because the allegations of interstate commerce in the questioned counts are not implied by reference to another count, i.e., count eighteen, but rather by the presence of an allegation in the challenged counts themselves. In *United States* v. *Psoinos Construction Co.,* 282 F. Supp. 473 (D. Mass. 1968) the indictment alleged that an employer had employees employed in an industry affecting interstate commerce, but failed to allege that the union sought to represent those employees who were so employed. Since the union may have sought to represent only those employees not so employed, the indictment was held insufficient to charge a crime under 29 U.S.C. §§ 186(a)(2), (d) (1964). This case is not contrary to our result since the allegation in question could not be necessarily implied by those present in the indictment.

Evidence that the specific allegation of interstate commerce was presented to the grand jury is not absent from the face of the indictment. In count eighteen the indictment specifically refers to "a labor organization engaged in an industry affecting commerce, to wit, Local 810, International Brotherhood of Teamsters, and Local 1614, International Brotherhood of Electrical Workers." It would be absurd to think that the grand jury could have found such a fact on count eighteen and have been in ignorance of it when they indicted on the other counts.[4]

The arguments that the court lacked jurisdiction and made an impermissible amendment to the indictment may be quickly disposed of. Lack of jurisdiction would exist only if the indictment did not charge a federal crime through failure to allege a connection with interstate commerce. An impermissible amendment would have been made only if the judge's charge had allowed or required proof of elements not charged in the indictment. Since we have decided that the words "labor organization . . . , to wit, Local 810, International Brotherhood of Teamsters and Local 1614, International Brotherhood of Electrical Workers," can be read to allege and require proof of the essential element of interstate commerce, there is no merit in Silverman's contentions on these points.

Counts One through Eight—The "POLITICAL CONTRIBUTIONS"

During the summer of 1965, Silverman was approached by Stanley Steingut, a Brooklyn Democratic leader, who asked for financial support for the candidacy of Abraham Beame and his running mates in the 1965 mayoralty campaign. Silverman agreed. Pursuant to the instructions of the administrator of the Beame Campaign, bills totaling $12,144.20 were sent to the two locals by two creditors of the Beame Campaign—Scoop Printing Company, Inc. and Behl Printing Co. The Scoop bills stated that they were for various stationery items ordered by the union. The

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[4] We are not relying upon this allegation in count eighteen to supply any allegations in the other counts of the indictment. See note 3 *supra* and accompanying text. Such allegation is merely evidence of what was before the grand jury when they indicted.

Behl bills bore the notation that they were for printing for political primaries. The Scoop bills are the subjects of counts one through eight. On October 27, 1965, Local 810 paid $2,581.37 to Scoop for the benefit of the Beame Campaign (count one). Between November 29, 1965 and June 21, 1966, Local 1614 paid $2,581.38 in seven equal installments to Scoop for the benefit of the Beame Campaign (counts two through eight).

Since my brothers Friendly and Hays are of the opinion that the conviction on counts one through eight must be reversed, the majority opinion as to these counts is to be found in the separate opinion of Judge Friendly (Judge Hays concurring). My views on these counts are set forth below and constitute my dissenting opinion.

All the parties conceded and the jury was charged that a political contribution *per se* by a union is not unlawful. The issue is rather whether the contributions were properly authorized and made for the benefit of the union. The unions' constitutions and by-laws were introduced to show that the unions had the power to make political contributions. The minute books revealed that resolutions purporting to ratify past political contributions and to authorize further contributions were passed by the membership of Local 810 on September 16, 1965 and by the membership of Local 1614 on September 24, 1965 and by the executive boards of both locals on September 24, 1965.[5]

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[5] These resolutions paralleled each other in language and were each preceded by a recitation of the "local situation" which led to the conclusion, "Favorable solutions of these and other pressing problems require candidates for local public office who are friendly to our aims and objectives." The resolutions themselves stated:

> "Resolved, that this local Union give aid and support to such local candidates in Primary and General Elections who merit our support: that appropriate publicity, manpower and financial assistance to be given in furtherance thereof; that any expenditures heretofore made for such purposes are ratified and approved: and that the President is further authorized to make such additional expenditures as he, in his discretion, believes reasonable and necessary."

On appeal, Silverman contends that there is insufficient evidence to support a conviction under section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959 (the Act). That section makes liable for criminal punishment anyone "who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the * * * assets of a labor organization of which he is an officer * * *." After reviewing the reported decisions in prior convictions under this statute, Silverman urges that there is no theory upon which the facts of this case can be said to constitute a violation of section 501(c). An initial issue is whether the conduct revealed in this case is of the type that Congress sought to prevent by imposing criminal sanctions.

The purposes and policies of the Act are revealed in section 2. Congress found from investigations of the labor and management fields that

> "there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct * * *." 29 U.S.C. § 401(b).

In section 501 Congress defined "in the broadest terms possible the duty which the new federal law imposes upon a union official." *Highway Truck Drivers and Helpers Local 107* v. *Cohen*, 182 F. Supp. 608, 617 (E.D. Pa.), *aff'd per curiam*, 284 F.2d 162 (3d Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). Section 501(c) created "a new Federal crime of embezzlement of any funds of a labor organization." *Colella* v. *United States*, 360 F.2d 792, 799 (1st Cir.), *cert. denied*, 385 U.S. 829 (1966). The crime is defined with the use of traditional terms and may be committed by several means. It was the plain intention of Congress to hold officers and employees strictly responsible as fiduciaries for the union funds entrusted to them and this intention should not be subverted by the use of indirect methods. *United States* v. *Harrelson*, 223 F. Supp. 869 (E.D. Mich. 1963).

The fiduciary role that labor officials must occupy is defined in section 501(a) to include a duty to hold the union's property solely for the benefit of the union and to expend it only in accordance with its constitution, bylaws and resolutions. Decisions finding violations of the criminal provision of section 501(c) have also emphasized the elements of appropriate union benefit and proper union authorization. Section 501(c) is read as requiring an intent to deprive the union of the use of its funds and *either* a lack of union benefit from the expenditure *or* a lack of proper authorization for the expenditure. In *Harrelson, supra*, the violation of section 501(c) "consisted in the use of union funds for political purposes with knowledge that such use was unauthorized and with the intent to deprive the union of its use of the funds." 223 F. Supp. at 871. The opinion gives no indication as to whether there was an issue as to union benefit from the expenditure, but there can be no doubt that it was unauthorized. In *Woxberg* v. *United States*, 329 F.2d 284 (9th Cir. 1964), the court affirmed one conviction because the jury could have concluded the issues of union approval and fraudulent intent adversely to the appellants, *id.* at 293, and reversed certain other convictions since there was no evidence of the required intent, *id.* at 294.

It is clear that when there is no possible union benefit from the use of the union funds made by the official, it makes no difference whether the use was authorized. Thus, in *United States* v. *DiBrizzi*, 393 F.2d 642 (2d Cir. 1968), the jury could have found that the expenditures "were personal non-business expenses and in no way incurred in furtherance of the union's business." Our court stated that:

> "Even if appellant may have established that his expenses were, as he claims, authorized and adopted by the union, such does not absolve him of his crimes * * *." 393 F.2d at 645.

Silverman argues that the basis of the *DiBrizzi* decision is that in no circumstances could a labor organization have the power to authorize payments of the personal non-union expenses of its officers. His rationale, stated in broader terms, would be that in every case where there is no union benefit, the authorization is *ultra vires* the union. Analogy is drawn to the *Highway Truck Drivers* case, *supra,* wherein an expenditure for legal expenses incurred by union officials in defending against criminal charges was enjoined under section 501(b). Such an expenditure was held to be outside the legitimate aims and purposes of the union as expressed in its constitution and as inconsistent with the aims, purposes and spirit of the Act. 182 F. Supp. at 620. If the interpretation of section 501(c) urged by Silverman were adopted, then every violation of that section would always involve *both* a lack of union benefit *and* a lack of authorization. The absence of benefit to the union would be the *sine qua non* of the offense and absence of a lawful authorization would become a concomitant element—present only through logical necessity. I would reject this interpretation of section 501(c). The purpose of Congress in enacting the Act was to preserve "high standards of responsibility and ethical conduct." 29 U.S.C. § 401(a). This purpose can only be fulfilled if the lack of authorization which indicates that the official's action is in breach of his fiduciary responsibilities is interpreted to include not only purported authorizations which are *ultra vires* but also those which are sham or procured through fraud upon the union membership. Under this broader view of unlawful authorization, a lack of union benefit will not aways be accompanied by a lack of authorization. Indeed, cases may present themselves where a union benefit is present and yet the fact that the authorization was a sham or procured through fraud would make section 501(c) applicable.

Silverman states that a charge under § 501(c) is not supported by "a showing of bad judgment in pursuing union ends even if the pursuit were unauthorized." Applt's Brief at 34. Cited as authority for this statement is a cryptic passage in *Colella* v. *United States*, 360 F.2d 792, 804 (1st Cir.), *cert. denied*, 385 U.S. 829 (1966). That case involved a padded expense account as to which the jury was charged that it must find the items to have "not been spent for a union purpose." The defendant claimed that he was prejudiced by the omission of the words, "whether such expenditures were or were not authorized." If the jury found that there was a union benefit and yet no authorization, the defendant would have been acquitted under the instruction as given. Therefore, the court said there was no prejudice in the charge. This could have been for either of two reasons: (1) It is a correct statement of the law that the presence of a benefit takes the act out of the prohibition of the statute whether authorized by the union or not, or (2) The presence of a union benefit does not immunize an act when the act is unauthorized and is done with fraudulent intent, but defendant was not prejudiced since the charge was more favorable than that to which he was entitled. I prefer the latter interpretation of the case.

To hold otherwise would be to encourage the freewheeling exercise of dictatorial power by labor leaders over the membership of their unions. Lawless transactions would occur which were only arguably or through the use of hindsight for the benefit of the union. Enforcement of "high standards of responsibility and ethical conduct" would be curtailed when the unbridled use of union funds can be immunized from the sanction of criminal liabilities by the fortuitous existence of a collateral union benefit. Overzealousness in government supervision of the fiduciary role of labor leaders is avoided by the requirement that a criminal intent be demonstrated in addition to the lack of either authorization or union benefit. The existence of a bona fide union benefit would be strong evidence that there was no intent to deprive the union of the use of its funds.

The charge given the jury in this case presented the issues of intent, authorization and benefit fairly and accurately (Tr. 1127-32, 1191). Silverman does not object on appeal that these instructions were in error. His objection is that under no theory were the facts sufficient to support the jury's verdict. In deciding whether, as a matter of law, the evidence presented no question for the jury, we must look at the evidence in a manner most favorable to the prosecution. *Woxberg* v. *United States, supra,* at 293; *Glasser* v. *United States,* 315 U.S. 60 (1942).

There can be no question that contributions to local political campaigns do not contravene the purposes of the Act. Supporting local candidates who are more sympathetic to the goals of the labor organization undoubtedly can be beneficial to the union and its membership. Engaging in political activities may be included in the constitution and bylaws of a labor organization as one of the legitimate purposes of the organization. In this case, the constitution and bylaws of both locals authorized political activity in broad terms.[6] Nevertheless, the existence of such power does not indicate that each particular exercise of it will be for the benefit of the membership and receive the bona fide authorization of the labor organization. The contributions which are the subject of counts one through eight were arguably made for the benefit of the union and arguably with its authorization. Yet there was substantial evidence presented to the jury from which it could have concluded that these contributions were either for the private benefit of Silverman or made with only a sham and invalid authorization from the unions.

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[6] The constitution of Local 810, for example, provides at section 2.04 of Article II as follows:

> "To the extent permitted by law within the limits of the means and finances available to us, this organization shall engage in political activities which tend to foster our welfare. * * * It shall include financial contributions in support of the campaigns of candidates or for or against any political issue."

The way in which the political contributions were solicited, paid and recorded in the books of account permits an inference adverse to the defendant's innocence. Silverman personally made a commitment to Steingut, apparently without any consultation with the union itself, and paid one-third of this commitment on September 13th—three days before the earliest authorizing resolution. The authorizing resolutions themselves were stated in overly broad terms—not stating the individuals to whom the contributions were to be made or the amount of the contribution.[7] The membership of the locals had no idea of the nature of the proposed or already executed expenditures and did not participate in any meaningful way in the authorization of such expenditures. One member of the executive boards of both unions testified that he did not remember the authorizations and had no idea of the amount of money to be contributed. Another member of the board testified that he might have objected to the amount in view of the deficit in Local 1614. Even more damaging is the accounting treatment given the contributions—a treatment which effectively precluded the membership from determining what amounts were spent and to whom the contributions were made. The Scoop bills (charged in the indictment) purported to be for stationery, while the Behl bills (not charged in the indictment) stated they were for printing for political primaries. Silverman approved the bills knowing that they represented political contributions. Yet not only the misleadingly labeled Scoop bills but also the correctly labeled Behl bills were entered in the books of account of both locals as "printing expenses" rather than "contributions." The jury could have concluded that

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[7] See note 5, *supra*.

Silverman knowingly participated in this misrepresentation of the nature of the expenditures.[8]

No reliance can be placed upon what the government calls the "peculiar location, *after* the signatures of the resolutions purporting to authorize political contributions." Brief at 33 (emphasis in original). No one drew attention to this alleged evidence or sought an explanation at trial. Upon examination of the exhibits we have found that the attached resolutions were incorporated by reference in the text of the minutes of each local (GX. 3, p. 14, *ll.* 10-12; GX. 5, p. 13, *ll.* 6-8) and that this practice was not unique (GX. 5, p. 7, *ll.* 30-34).

I would hold that the degree of domination and control exercised by Silverman over the labor organization and its personnel is relevant to a determination of whether the authorization was a mere sham and whether the purpose was for a private non-union benefit. I recognize the danger that such evidence may mislead the jury into the fallacy involved in making the forbidden "bad man inference."[9] The degree of control is certainly relevant, as recognized in the charge in this case, to the intent with which the defendant acted (Tr. at 1129). It may well be that the mere demonstration of one-man control of a labor organization would be insufficient evidence, in itself, to support a finding that a resolution was sham or null and void or that it was passel for the private benefit of the union leader. Nevertheless, such evidence, when combined with certain other facts, lends support to the reasonableness of a jury's verdict. Here the testimony as a whole revealed a striking lack of attention to the functioning of the union leadership by the executive committees and the memberships.

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[8] Count fifteen charged that the political contribution charged in count one was falsely reported in the 1965 annual report made by Local 810 to the Secretary of Labor. The disbursement was listed as "Office and Administrative Expense" rather than as "Contributions, Gifts and Grants." The jury verdict of guilty on count fifteen is not attacked on appeal as unsupported by evidence.

[9] See discussion below.

In conclusion, I find that a conviction under section 501(c) may be made out by a demonstration of a fraudulent intent to deprive the union of its funds and either a lack of bona fide authorization or an absence of benefit to the labor organization from the expenditure. Therefore, I would hold that the facts presented in this case were sufficient to support the jury's verdict on the charges in counts one through eight.

Counts Ten Through Thirteen—The "CHRISTMAS GRATUITIES."

On December 7, 1965 and again on December 13, 1966, Silverman received a check from each of these two locals in the amount of $2,000. These four checks are the bases for the charges of violation of section 501(c) contained in counts ten through thirteen. These payments to Silverman were carried on the books of account as steward's committee expenses. The reporting of two of these payments in such a manner in the Labor-Management Reports of 1965 and 1966 led to counts sixteen and seventeen of the indictment. Silverman argues that his acquittal of the charges in counts sixteen and seventeen implies that the jury must have been using some "misguided theory" when it found him guilty on counts ten through thirteen. He also argues that there was insufficient evidence to support the verdict on these counts.

It is not difficult for us to reconcile the acquittal on counts sixteen and seventeen with the guilty verdict on counts ten through thirteen. The jury might well have concluded that Silverman lacked an awareness of the nature of the Labor-Management Report in question which would be required to support a finding that he acted willfully or recklessly as to this item of false reporting. We need go no further in justifying the opposite results reached by the jury on counts involving so few common elements as these.

The primary thrust of Silverman's attack on the sufficiency of the evidence is that it fails to support a finding that the money was expended for a non-union purpose. Reliance is placed on *United States* v. *Lynch,* 366 F.2d 829 (3d Cir. 1966) wherein the absence of a union record that a certain initiation fee had been received was found insufficient to support the inference that the fee had not been received by the union. Without any other proof that the union had not received the fee, the Third Circuit held the inference that Lynch had converted the fee to his own use was too tenuous to be drawn. *Lynch* establishes no *per se* rule that an inference of embezzlement may not be drawn from inadequate union records. Rather, it merely applies the familiar principle that all the circumstances must be examined in determining whether the direct proof and permissible inferences support the jury verdict.

It is admitted that Silverman received money that belonged to the union, expended that money and did not file vouchers to show the use to which the money was put. Since what happened to the money after it left the hands of the union was wholly within the knowledge of Silverman and only he could supply the information to fill the gap in the union records created by the absence of vouchers, we feel that the *Lynch* case does not prevent the jury from drawing inferences adverse to Silverman's innocence. Silverman testified that the Christmas gratuities checks were traditionally issued to him and that he commonly used $500 to $800 to reimburse himself for his own advances to various union members and the remainder for distribution to active union members. This explanation might have been rejected by the jury in view of the testimony of Vito Spano, a member of the executive boards of both locals for over 20 years, that past "practice" had been brought to his attention only a few months before the trial.

Turning from the quesiton of whether the Christmas gratuity checks were used for a non-union purpose to the question of whether the drawing of the checks was authorized, we find that the jury could have concluded that the authorizing resolutions were wholly fabricated. Silverman attempted to establish that an annual practice dating back to 1960 existed whereby "bonuses" were channeled through him to shop stewards and others. It is unclear whether the term "Christmas bonuses" was used as an alternate characterization of the "Christmas gratuities." The jury could have concluded that it was not. The authorizations for "Christmas bonuses" often referred to the officers, staff and clerical help of the union while any reference to "Christmas gratuities" was to expenses incurred by Silverman during the holidays. Therefore, the resolutions which Silverman relies upon to justify the 1966 payments can be understood to relate to wholly different transactions than the ones charged in counts twelve and tihrteen. Under such circumstances there was no authorization for the 1966 payments, as admitted by both Spano and Alex Kibuik, a member of the executive board of Local 1614 for eight years, during their testimony as witnesses called by the government.

The minutes of the executive board of each local on December 3, 1965, as received by the government during its investigation, contained statements that Silverman reported that he had paid for organizational work and entertainment and would need money for Christmas gifts. These "reports" conclude with a request for $2,000 as "additional compensation." These minutes were examined by the Federal Bureau of Investigation. An FBI expert gave testimony that the typewriter used to prepare page 21 of the Local 810 minutes and page 19 of the Local 1614 minutes (the pages upon which Silverman's reports and requests are found) was not used in the preparation of the other page of the minutes of the December 3, 1965 meetings or any other page in the minute book of either local for the entire year. That this discrepancy was evidence of the fact that the authorization for the Christmas gratuities was fabricated is confirmed by the so-called "Friedland report."[10] Jacob Friedland was an attorney retained to examine the records of Local 810 before they were produced in compliance with a grand jury subpoena. His testimony and report tend to indicate that the minutes had been changed in order to supply an absent authorization for a loan of $2,000 to Silverman. In addition, neither Kibuik nor Spano recalled the alleged authorizing resolutions being made at the December 3, 1965 meetings. Since both the loan authorization and the so-called gratuity authorization were in the same paragraph, this evidence would permit the jury to conclude that the 1965 authorization was fabricated.

In sum, we find the verdicts of guilty on counts ten through thirteen are supported by the evidence and that the jury could have concluded that the amounts involved were either retained by Silverman or used to maintain his own hegemony over the two locals. The strained interpretation of "Christmas bonuses" in 1966 and outright revision of the 1965 minutes would have allowed the jury to find that the alleged authorization was wholly fabricated. We affirm these convictions.

Count Fourteen—The "AIR CONDITIONER"

Count fourteen of the indictment charged Silverman with embezzling $1,000 from the unions' Health and Welfare Fund on or about July 18, 1966. In response to a motion for a bill of particulars, Silverman learned that the conversion in count fourteen was the only one of the embezzlement counts (counts one through fourteen) which was accomplished by the receipt of cash. He also learned that the receipt was direct and not constructive as in counts one through eight. Except for a few informal disclosures in open court, further particulars were not revealed until two weeks before trial. Defense counsel then learned that during the renovation job on a building purchased by the welfare fund for use as a joint headquarters for the four labor organizations, an old central air conditioner was purchased by a scrap dealer known as Marshall Katz. Katz had cashed a check for $1,000 and paid the proceeds to some undisclosed person who delivered the proceeds to Silverman.

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[10] The admissibility of this evidence is discussed below.

At the trial the government presented Paul Chlystun, the superintendent of construction, who testified that Silverman had instructed him to sell the air conditioner and that the proceeds of the check had been delivered by him to Silverman on the morning of July 18, 1966. Silverman did not claim surprise at the presentation of this evidence; in fact, he presented seven witnesses in defense whose testimony raised the issues of the true value and ownership of the air conditioner and the credibility of Chlystun based on bias against Silverman and prior convictions for bookmaking. Apparently, the jury believed Chlystun and disbelieved Silverman's denials since they convicted Silverman on this count.

Eight months after the trial Silverman filed a motion for a new trial on the basis of newly discovered evidence. The claim is that at no time prior to the trial could the importance of Silverman's whereabouts on the morning of July 18, 1966 have been anticipated. The newly discovered evidence was claimed to establish an alibi. The claim, supported by affidavits of eight people, is that Silverman was at an all-day negotiating session at the Conver Steel and Wire Company on East 132nd Street in the Bronx. Judge Palmieri denied this motion on the ground that the decision not to present an alibi defense had been a knowing one made for tactical purposes or, alternatively, the failure to inquire into the existence of an alibi defense was a mistake that could not be "raised to the dignity of a reason for a new trial." He also held that the affidavits were not "sufficiently persuasive or solid" to have "probably" led to Silverman's acquittal if presented at the trial.

In *United States* v. *Polisi,* 416 F.2d 573, 576-77 (2d Cir. 1969) we stated:

> "The generally held essentials for a new trial based on newly discovered evidence are the following: (1) the evidence must have been discovered since the trial; (2) it must be material to the factual issues at the trial, and not merely cumulative nor impeaching the character or credit of a witness; (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial. United States v. Costello, 255 F.2d 876 (2d Cir.), *cert. denied,* 357 U.S. 937 (1958)."

Compare *Berry* v. *State,* 10 Ga. 511, 527 (1851).

The test of the materiality of the evidence stated above, "it would *probably* produce a different result," may be likened in certain cases to the test stated in *Larrison* v. *United States,* 24 F.2d 82, 87-88 (7th Cir. 1928), "the jury *might* have reached a different conclusion." The application of this latter test has been said to be limited to cases of "recantation or where it has been proved that false testimony was given at the trial." *United States* v. *Hiss,* 107 F. Supp. 128, 136 (S.D.N.Y. 1952), *aff'd,* 201 F.2d 372 (2d Cir.), *cert. denied,* 345 U.S. 942 (1953); *United States* v. *Miller,* 411 F.2d 825, 830 (2d Cir. 1969); *United States* v. *Costello, supra,* at 879. In the case before us there was neither recantation by Chlystun of his testimony nor proof satisfactory to the trial court that his testimony was false. A motion for a new trial is addressed to the discretion of the district judge and our scope of review is accordingly limited. Factual determinations made by the trial court in passing on a motion for a new trial based on newly discovered evidence may not be set aside unless the findings are "wholly unsupported by evidence." *United*

States v. *Johnson,* 327 U.S. 106, 111-12 (1946). We cannot disturb the trial court's finding of a lack of the persuasiveness and solidity of the affidavits in establishing falsity in Chlystun's testimony.

This is not a case where we need determine whether an exception to the general rule given above may exist where the prosecutor has suppressed evidence. See *United States* v. *Miller, supra; United States* v. *Polisi, supra.* Silverman does not claim that evidence was suppressed. He implies that the government was less than candid in supplying particulars on count fourteen, yet he makes no direct attack on the government's position that giving too many details of the transaction would identify its witness and perhaps subject him to unseemly pressure. No claim of surprise was made after Chlystun's identity was revealed at trial. The defense knew that the charge under count fourteen involved a direct embezzlement of cash. It is hard to understand how any conduct by the prosecution could have prevented defense counsel from investigating and presenting a defense of alibi before the end of the trial. Cf. *Brown* v. *United States,* 333 F.2d 723 (2d Cir. 1964); *United States* v. *Edwards,* 366 F.2d 853, 873 (2d Cir. 1966), cert. denied, 387 U.S. 935 (1967).

Applying the rule stated in *Polisi, supra,* and the limitation on review established in *Johnson, supra,* we find no error in the denial of a new trial.

Count Eighteen—The "FALSIFICATION OF BOOKS"

Count eighteen of the indictment charged generally that Silverman had caused false entries to be made in the books and records of the two locals in violation of 29 U.S.C. § 439(c) (1964). The evidence revealed at least three specific instances of reporting which might have been considered by the jury in reaching its determination—a circumstance which causes the defense to argue that the charge was "open-ended." These instances of alleged false reporting were the accounting treatment given the bills from the Scoop Printing Company and the Behl Printing Company,[11] the accounting treatment given the "Christmas gratuities" payments,[12] and the allegedly fabricated pages in the minute books. Both by the government at trial and by the defense on appeal, emphasis was placed upon the fabrication of the minute books. While not conceding that the jury could not have found Silverman guilty under Count eighteen upon the proof of improper accounting, we feel that the conviction may be affirmed upon the proof of fabricated minute books.

Silverman's attack upon his conviction under Count eighteen is focused upon the testimony of the attorney Jacob Friedland about his report to Local 810 after having examined their records and the admission into evidence of a portion of the text of that report. Friedland's examination of the records of Local 810 was in early 1967 after the local had received a grand jury subpoena *duces tecum* and before the minutes were submitted to the grand jury. When the government learned of the existence of the report made after this examination, it subpoenaed the report. Judge Thomas F. Murphy granted the local's motion to quash the subpoena on the grounds that the report was protected by the attorney-client privilege, despite the government's argument that Friedland was retained to aid in the commission of a crime.

At trial, Friedland was called to the stand and asked if he remembered the closing paragraph of page 21 of the minutes of the executive committee of Local 810, which purportedly authorized a $2,000.00 loan and $2,000.00 for Christmas gratuities. When Friedland denied any independent recollection of this paragraph, the government asked that the report, then in the possession of David I. Shivitz, attorney for Local 810, be shown to Friedland. After extended colloquy, Judge Palmieri declined to rule on the claim of privilege until further evidence was adduced.

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[11] The books of account of both unions carried the Scoop and Behl payments under "expenses to creditors" in the cash disbursements journal and "printing expenses" in the general ledger, although an account for "contributions" existed and was correctly utilized on other occasions.

[12] The $2,000 checks issued to Silverman were carried on the books as a "committee expense."

Later in the trial, James C. Cadigan, a special agent for the Federal Bureau of Investigation, testified that page 21 of the minutes (as well as page 19 of the Local 1614 executive committee minutes) had been prepared by a typewriter not used in the preparation of any other page in the minute book. Members of the executive boards had testified that they had no recollection of the resolutions found on those pages which purported to authorize Christmas gratuities and a $2,000.00 loan to Silverman. When Friedland was recalled as the government's final witness, the claim of privilege was overruled as to that part of the report which related to a description of the minute books as they were when delivered to Friedland. The claim was denied because there was no confidentiality in the communication of the contents of the minutes, which were public records of the union[13] and because the privilege was being used to frustrate the government's attempt to prove that the minute books had been tampered with, perpetrating a fraud upon the court. Thereupon, Friedland claimed his Fifth Amendment privilege. Immunity from prosecution was secured for Friedland under 18 U.S.C. §§ 2514, 2516 (1)(b) (Supp. IV, 1965-68) in time for him to be recalled as a rebuttal witness. His testimony was:

> "I have no independent recollection of the contents of the minutes of December 3, 1965, but on examination of my report to which you refer to, my memory has

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[13] 29 U.S.C. §§ 431(c), 436 (1964).

> been refreshed with respect to these minutes, and basing it entirely on the report it indicates a change in the minutes."

The portion of the report which was referred to by Friedland in his testimony and acknowledged and authenticated by him was photostated and introduced into evidence as court's exhibit 6A. It stated:

> "There is a loan to Milton Silverman in December 1965 and there is no approval of this loan by the Executive Board.
>
> "There is a payment of $2,000 to Mr. Silverman in December 1965 for Christmas gifts and this requires and accounting of where the money was spent." [14]

If this report was properly before the jury without violation of the attorney-client privilege, the jury could have concluded that the minutes had been altered after they were returned from Friedland and before they were surrendered to the grand jury investigation. Since the alteration was to supply approval for a loan to Silverman and perhaps authorization for Christmas gratuity payments, the jury could have determined that Silverman was responsible for the alteration.

As we stated in *Colton* v. *United States*, 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963):

> "[T]he attorney-client privilege protects only those papers prepared by the client for the purpose of confidential communication to the attorney or by the attorney to record confidential communications * * *."

Friedland's report was neither of these. The communication made by the client in delivering the minutes to its

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[14] When the trial judge indicated that he would introduce the first sentence quoted as a court exhibit, defense counsel requested that the second sentence be added.

attorney was not a confidential communication of the contents of the minutes since those minutes are public records. Perhaps confidential communications were made at the same time, e.g., "give me your advice as to how these minutes should be prepared in the future" or "tell me what is wrong with these past minutes," but communications of this type were not revealed or even sought to be revealed. The portion of the report which was revealed was a description of the minutes as they appeared when presented to Friedland. That portion did not record a confidential communication.

The privilege as commonly formulated refers to a confidential communication* FROM *the client* TO *the attorney. 8 Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961); compare Uniform Rule of Evidence 26 ("between lawyer and his client"). Wigmore states that the reason for bringing communications from the attorney to the client within the privilege is to prevent adopted admissions or inferences of the tenor of the client's communication. 8 Wigmore, Evidence § 2320 (McNaughton rev. ed. 1961). The purpose of the privilege, the encouragement of full disclosure to the attorney in procuring legal advice, implies that a communication from an attorney is not privileged unless it has the effect of revealing a confidential communication from the client to the attorney. In discussing the privilege extended to communications from an attorney, Judge Wyzanski has stated:

> ***"It follows that in so far as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on, information furnished by an officer or employee of the defendant in confidence and without the presence of third persons. . . .***
>
> ***"However, . . . there is no privilege for so much of a lawyer's letter, report or opinion as relates to a***

> *fact gleaned from . . . a public document such as a patent, cf. Edison Electric Co.* v. *United States Electric L. Co.,* [*44 F. 294 (C.C.S.D.N.Y. 1890)*].''

United States v. *United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950).**

In view of the position we adopt with respect to the confidentiality of the content of the communication revealed by the attorney's report, we need not determine whether the report was otherwise admissible under the theory that the client's purpose in consulting an attorney was in furtherance of a crime *to be* committed, e.g., *United States* v. *Bob,* 106 F.2d 37, 39-40 (2d Cir.), *cert. denied,* 308 U.S. 589 (1939); *Clark* v. *United States,* 289 U.S. 1, 15-16 (1933). Nor do we need to make a finding, which the trial court failed to make, as to whether Friedland was the attorney of Local 810 and not of Silverman, therefore leaving Silverman without standing to assert error in the ruling by the trial judge. 8 Wigmore, Evidence § 2321 (McNaughton rev. ed. 1961); McCormick, Evidence § 96 at 196 (1954).

We hold that the report was properly admitted into evidence and that the evidence was sufficient to sustain the conviction under Count eighteen.

Fair Trial

Silverman contends that he did not receive a fair trial. The bases of this contention are ''the admission of completely irrelevant evidence,'' the practice ''of allowing evidence of at best peripheral relevance that was prejudicial to defendant, and then foreclosing him from explaining it,'' and ''the prosecutor's efforts to imply wrongdoing when none was proved.'' Brief at 70-71. Several of the specific events alleged require close scrutiny and are discussed below. Some of the evidence objected to on appeal was introduced by the defendant himself as part of his trial strategy. For example, in explanation of the false itemizations on the Scoop Printing bills, the defense sought to show that corporations wanted their non-deductible political contributions converted into deductible business expenses. Now, it claims that the evidence has no rational connection to the crime charged. Some of the evidence was properly admitted for the limited purpose offered. For example, it was proper to reveal that substantial legal fees were received by the law firm of Shivitz, a character witness, to impeach his testimony by showing motive or bias. Some of the allegations of misconduct by the prosecutor are exaggerations made by removing the comment from the context in which it was made. For example, the reference to the ten-year government investigation of James R. Hoffa in the prosecutor's summation was to refute the defense's argument that Silverman was the innocent victim of this concerted investigation.

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* Paragraph deleted on Rehearing.

Evidence Showing Silverman's Domination and Control

The evidence having perhaps the greatest potential for prejudice was that which revealed that Silverman exercised almost single-handed control of the activities of the two locals. The danger in admitting evidence of this sort is that the jury may infer that the possession of such power is evidence of bad character. If this inference is made, then the jury may be on its way to the forbidden inference that a person whose character, reputation, or specific acts reveal a tendency or disposition to act in a disapproved fashion is likely to have performed the particular acts alleged in the indictment. Even in the case of direct proof of bad character, such as evidence of prior criminal acts, there are exceptions to the general rule of exclusion when the evidence is substantially relevant for some purpose other than to show a probability of guilt based on the inference from his bad character. See McCormick, Evidence

§ 157 at 327-31 (1954). Here the evidence introduced was not nearly so prejudicial as direct evidence of prior criminal acts or of bad character—areas where rules of exclusion have been distilled from the circumstances of many cases. The rulings of a trial judge on evidence such as this should be respected on appeal in the absence of a clear abuse of discretion. McCormick, *supra,* § 157 at 333. The exercise of discretion by the trial judge requires a careful balancing of the probative value of the evidence against the possibilities of prejudicing the jury, sidetracking the trial or surprising the defense. McCormick, *supra,* § 152 at 319-20. Here the evidence of domination and control was necessary to negative the anticipated defense contentions that the expenditures in question were authorized and for the benefit of the unions. It was also relevant to the issue of intent. The prejudice depended upon an inference by the jury that such domination and control is evidence of a criminal propensity. We would frown on any comments from a prosecutor which might encourage the jury to be so prejudiced, but we are not convinced that such attempts were made in this case. We feel that no reversible error was committed below in the handling of this evidence.

We have already alluded above in our discussion of the sufficiency of the evidence to the striking lack of attention to the functioning of the union leadership by the executive committees and the memberships. Spano and Kibuik, members of the executive committees, were unable to remember the authorizations for significant expenditures of the unions. Louis Pavlo, the secretary-treasurer and a necessary co-signer of the checks of both locals, customarily signed fifty and a hundred checks in blank and surrendered them to C. William Nass, the bookkeeper for both locals. It was to reveal this lack of attention with its concomitant domination of union affairs by Silverman that the most hotly disputed piece of evidence in this category was admitted—the purchase of $685 worth of cigars with the funds of Local 810.

The initial mention of the cigars came when Spano was on the stand. Defense counsel had sought to reveal authorization of the expenditures for Christmas gratuities by showing Spano's signature on trustee certificates approving expenditures from month to month. On re-direct, this evidence was refuted by attempting to show that the approval was meaningless since Spano did not know what he was approving. Spano did not know that the general approval he had signed might include an expenditure for cigars. Later evidence established the precise amount spent for these cigars and suggested that the cigars might have been distributed to the union membership. When the defense mentioned the possible prejudicial effect of this evidence, the trial judge correctly recognized that it had a purpose beyond the idea that Silverman was a "cigar-smoking racketeer."

The manner in which the union was operated was also iluustrated by the so-called "gag order" issued under the name of Milton Silverman. It was personally served by a "security officer" on twenty-eight officials of the labor organizations involved. It stated:

> "If you are approached by any Federal Investigators do not give them any information. Refer them to our attorney, Mr. Shivitz.
>
> "Anyone disregarding these orders will be *summarily terminated.*"

(Emphasis in original.) The government, after having confronted Silverman on the stand with this document, made use of it during summation to show his domination and control over the unions. The prosecutor's graphic statement to put the order in context by comparing it to "the words of Samuel Gompers, one of the founders of the American labor movement, or . . . the words of an Adolph Hitler," was correctly recognized by the trial judge as a "flight of eloquence."

Another factor, which could be evaluated only by the jury and the judge, revealing the domination of the unions by Silverman is the attitude of the union men who testified for the government. Their credibility was to be evaluated in the light of the grants of immunity and their common counsel.

Immunity and Common Counsel

Silverman argues that his convictions should be reversed because of misconduct of the prosecutor in questioning witnesses as to whether they would have testified without having been granted immunity from prosecution and as to the identity of their lawyer. He asserts that it was the intention of the prosecutor to use the grants of immunity and the use of a common counsel "to imply general union misconduct—that defendant's associates had been guilty of immunizable wrongdoing—and therefore defendant, who allegedly dominated them, had surely done something wrong." Applt's Brief at 54. Relying upon cases in which the prosecutor has placed a witness on the stand, knowing that he would validly invoke the privilege against incrimination, e.g., *United States* v. *Maloney,* 262 F.2d 535 (2d Cir. 1959), Silverman contends that the government has made "a conscious and flagrant attempt to build its case out of inferences arising from . . . " the grants of immunity. *Namet* v. *United States,* 373 U.S. 179, 186 (1963).

We have examined the arguments made during summation by government counsel and have found no deliberate attempt to use the grants of immunity to infer the guilt of Silverman. Each reference to the immunity was to emphasize the reluctance of the witnesses to testify. This reluctance was relevant to the jury's evaluation of the witnesses' credibility.

Neither was there error in permitting the government to bring out the grants of immunity or the common counsel on its direct examination of the witnesses. *United*

States v. *Brill*, 350 F.2d 171, 174 (2d Cir. 1965). A grant of immunity, to government witnesses, just as the prior criminal record of its witness, *United States* v. *Murray*, 297 F.2d 812 (2d Cir. 1962), or a plea of guilty by the witness with sentencing awaiting the giving of testimony for the government, *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969), or an invocation of the Fifth Amendment before the grand jury with a subsequent promise of no prosecution in return for a promise to testify for the government, *United States* v. *Brill, supra,* may be brought out on direct examination, provided the jury is cautioned that the testimony is not evidence of the defendant's guilt. As we stated in *United States* v. *Freeman*, 302 F.2d 347, 350 (2d Cir. 1962), *cert. denied,* 375 U.S. 958 (1963):

> "There may be circumstances where, on proper request of the defense, the trial judge should limit, or even bar such testimony, or allow it only under cautionary instructions because of the witness' admission of crime implicating the defendant would outweigh the advantages of a full disclosure of the witness' criminal background."

There was no objection to the questions concerning the identity of the witness' counsel and the grant of immunity at the time these questions were asked. No objection was made to the instruction that failure to testify except upon a grant of immunity allows the inference that the testimony was given "with reluctance." Nor were there requests at trial for a more explicit instruction that neither the grants of immunity nor the use of a common counsel would support an inference as to the guilt or innocence of the defendant. In the absence of such objections and after having found, in the context of the whole case, that the failure to give more explicit instructions is not plain error within Fed. R. Crim. P. 52(b), we find no reversible error. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied,* 383 U.S. 907 (1966).

Cross-Examination of Character Witnesses

Silverman presented seven character witnesses. Before cross-examination was begun, the government put defense counsel on notice that questions would be asked concerning the prior arrest record of the defendant. Defense counsel objected on grounds of prejudice because none of the arrests had culminated in convictions. The trial judge ruled that such questions would be proper and added that the defense would be allowed to establish the fact that the defendant had never been convicted. On appeal a broadside attack is launched on the use of this procedure and the prejudicial consequences of it. Specifically, Silverman objects that (1) there was no determination of the prosecutor's good faith made before the questions about prior arrests were propounded to the witness; (2) the character traits involved in the prior arrests were not those established by the good character testimony and the arrests were too remote in time to be relevant; (3) inadequate cautionary instructions were given; and (4) testimony in rebuttal was improperly excluded.

In its consideration of the use of prior arrests in the cross-examination of character witnesses, the Supreme Court stated that the trial judge must have broad discretion. Reversal by appellate courts occur "rarely and only on clear showing of prejudicial abuse of discretion." *Michelson* v. *United States,* 335 U.S. 469, 480 (1948).

This is not a case wherein the trial judge either was affirmatively mistaken in his view of the law as established in *Michelson, supra,* or misconceived the permissible inquiry allowed by that decision. See *Roberson* v. *United States,* 237 F.2d 536, 541 (5th Cir. 1956), *cert. denied,* 356 U.S. 919 (1958); *Wilcox* v. *United States,* 387 F.2d 60, 64 (5th Cir. 1967). In the absence of a demand for a demonstration out of the hearing of the jury of the good faith of the prosecutor in asking questions about actual events which were likely to arise in community discussion of the defendant's character and reputation, we cannot conclude that the trial judge erroneously failed to satisfy himself that such requirements were met.

The arrests that were brought out on cross-examination were an assault arrest 14 years ago and a forgery arrest 29 years ago. The argument that these were too remote in time and revealed character traits which were dissimilar to those raised in the direct examination should have been raised before the trial judge to aid him in making the initial determination as to the propriety of the questions. As it was, the objection as to prejudice was only on the ground that the arrests had not led to convictions. This objection was properly met by allowing the defendant to establish that the arrests had not resulted in convictions. This fact was established both by the use of some of the character witnesses and by the testimony of the defendant himself. Attempts by defense counsel to present the circumstances of these arrests to reveal that they were wholly baseless were properly rejected as attempts to raise issues which were collateral to the charges before the jury. The problem of the trial-within-a-trial may be avoided by limiting rehabilitation of a character witness impeached by even improperly phrased questions about prior arrests to responses about the outcome of these charges. *Shimon* v. *United States*, 352 F.2d 449 (D.C. Cir. 1965).

The cautionary instruction given at the end of the trial gave full and fair treatment to the problems presented by the use of prior arrests in impeaching a character witness. Silverman's complaint that this was "too late" is untenable in view of the proper presentation of the questions before the jury and the absence of a request for instructions at the time the questions were asked. *United States* v. *Giddins*, 273 F.2d 843, 846 (2d Cir.), *cert. denied,* 362 U.S. 971 (1960).

Judgment of conviction and order denying a new trial affirmed, except as to counts one through eight which are reversed in accordance with the accompanying opinion of Judge Friendly.

Friendly, *Circuit Judge* (with whom Hays, *Circuit Judge*, joins):

We are unable to agree to the affirmance of the convictions on counts 1-8, relating to the payments to Scoop Printing Company, Inc. Although in this case the only practical effect of our different opinion is to reduce the fine from $16,000 to $8,000, the construction of 29 U.S.C. § 501(c) is an issue that will be with us for a long time.

When Congress in 1959 subjected to criminal sanctions "any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another" any of the assets of a labor organization of which he is an officer or employee, it was not inventing new language. The phraseology resembles that used in defining many "larceny-type" offenses in the criminal code. See, e.g., 18 U.S.C. § 641 (public money, property or records), § 645 (court officers), § 654 (officer or employee of United States embezzling or converting money or property of another), § 655 (theft by bank examiner), § 656 (theft, embezzlement, or misapplication by bank officer or employee), § 657 (employees of various lending, credit and insurance institutions), § 658 (property mortgaged or pledged to farm credit agencies), § 659 (interstate or foreign shipments by carrier), § 660 (carrier's funds derived from interstate commerce), § 661 (personal property within maritime and territorial jurisdiction); 15 U.S.C. § 80a-36 (assets of registered investment companies). These statutes have gone beyond the common law offense of larceny and the old statutory crime of embezzlement because "gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches," *Morissette* v. *United States*, 342 U.S. 246, 271-72 (1952). But, as was there held, despite minor variations in language the common thread is that the defendant, at some stage of the game, has taken another person's property or caused it to be taken, knowing that the other person would not have wanted that to be done. See *Brown* v. *Bullock*, 294 F.2d 415, 418-20 (2 Cir. 1961). Congress subjected union officers or employees to the same test of criminal liability as government employees, bank officers and the like—not to a lower one. See *Colella* v. *United States*, 360 F.2d 792, 798 n. 4 (1 Cir.), *cert. denied*, 385 U.S. 829 (1966), and the legislative history there cited.

It is not seriously asserted that by causing the payment of Scoop's printing bills for the Beame mayoralty campaign, Silverman "embezzled" or "stole" the unions' assets in the ancient sense of those terms; the claim is that he unlawfully and willfully converted monies to the use of another. It is easy to understand how a union employee does this when he "unlawfully and willfully" uses union funds in a manner that works to the personal benefit of himself or the payee and does not benefit the union, whether or not the union went through the form of authorization; the "union" presumably would have objected if it had been able to speak freely. Such was this court's holding in *United States* v. *DiBrizzi*, 393 F.2d 642, 645 (1968), and the First Circuit's in *Colella* v. *United States*, *supra*, 360 F.2d at 804. But, as our brother Moore correctly recognizes, that is not this case, since the unions' constitutions contemplated financial contributions in support of the campaigns of political candidates. While it is doubtful whether a payment made in a *bona fide* belief that it was for a union's benefit and that it had been authorized or would be ratified, can ever be swept under 29 U.S.C. § 501(c), we do not need to face that issue here. Even if one should accept *arguendo* that a "conviction under section 501(c) may be made out by a demonstration of a fraudulent intent to deprive the union of its funds and either a lack of bona fide authorization or an absence of benefit to the labor organization from the expenditure," we fail to see how the Government presented evidence that could cause a reasonable juror to be convinced of this beyond a reasonable doubt with respect to counts 1-8.

As already indicated, the Government's case on the issue of lack of benefit failed. But its case with respect to lack of authorization was equally weak. Resolutions appearing in the minutes of both unions authorized Silverman to make such contributions to candidates for local public office (who supported union goals) "as he, in his discretion, believes reasonable and necessary."[1] In the minutes of each local these resolutions were set out on the page after that containing the signatures of the members of the executive board, and the Government's brief used this plus the supposed lack of any reference to the resolutions "in any of the material *before* the signatures," to challenge the validity of the authorizations. The argument would hardly have been made if the Federal Rules of Appellate Procedure had been complied with,[2] for inspection of the exhibits shows that the resolutions are identified in the body of both sets of minutes by mover and seconder, are described as "attached," and are reported as unanimously passed. Judge MOORE thus rightly disclaims any reliance on this line of attack. However, he accepts another misleading statement by the Government that a union officer testified he "had no recollection of the resolution." What the union officer actually said was that he could not recall whether the pages containing the full text of the resolutions were there when he signed the minutes. Some reference is made to the authorizing resolutions being "overly broad." But we find nothing in the Landrum-Griffin Act about that, and whether they were or not, this is a long way from establishing criminal liability for acting for a proper union purpose in reliance on them. Apart from the extent of control Silverman exercised over union affairs, which the opinion rightly characterizes as "insufficient evidence, in itself, to support a finding that a resolution was sham or null and void," all that is left is the false entry of the Scoop payments on the unions' books. But this was a separate violation, of which Silverman was convicted under Count 15, and although concealment is relevant to show evil motive or guilty knowledge, it cannot make a crime where there was none.

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[1] None of the Scoop bills were paid prior to the passage of the resolution.

[2] Noting that the minutes were not reproduced in the book of exhibits furnished by appellant pursuant to FRAP 30(e), we inquired at the argument where they were. It turned out that these and other important exhibits had been retained by the Government rather than being kept by the clerk of the district court and transmitted by him as FRAP 10(a) and 11(a) plainly require. We should no longer tolerate such studied ignoring of these salutary rules despite the long standing disregard of them and their predecessor in the Southern District of New York, especially in criminal cases. Whatever may have been the justification for that twenty years ago, the development of methods of photographic reproduction generally makes it feasible for a party offering an exhibit to have enough copies for himself and his adversary and to leave the original with the clerk as the rules require. Indeed, the Government found this quite easy after we had demanded the exhibits here. When the bulk of a documentary exhibit makes reproduction impractical, it should be left with the clerk of the district court, who can make it available to both sides as they may require. See also FRAP 11(b), third sentence.

Although this trial seems to have been characterized by a degree of over-kill on the part of the prosecutor, we accept Judge MOORE's able treatment of the other appellate issues raised.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of July one thousand nine hundred and seventy.

Present:

Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Hon. Paul R. Hays,
Circuit Judges.

United States of America, *Plaintiff-Appellee,*

v.

Milton Silverman, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed in part and reversed in part in accordance with the opinions of this court.

A. Daniel Fusaro,
Clerk

[Filed July 1, 1970]

By Vincent A. Carlin,
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September Term, 1969

Nos. 494 and 561

(Submitted July 29, 1970. Decided Dec. 11, 1970)

Docket Nos. 33584 and 34392

UNITED STATES OF AMERICA, *Appellee*,

v.

MILTON SILVERMAN, *Appellant*.

Before: MOORE, FRIENDLY and HAYS, *Circuit Judges*

Opinion on Petition for Rehearing

Paul Weiss, Goldberg, Rifkind, Wharton & Garrison, New York, N. Y., by Simon H. Rifkind, Edward N. Costikyan and Theodore W. Striffles, New York, N. Y., of counsel, *for Appellant.*

PER CURIAM

Appellant's petition for a rehearing suggests that our opinion makes an exception to the attorney-client confidential communication rules. This was not the intent of the opinion. To avoid any such impression, the paragraph of the decision filed July 1, 1970, reported in 430 F. 2d at page 122 and reading "The privilege is commonly formulated . . ." and continuing to the paragraph on page 122 (right-hand column) reading "In view of the position . . ." in the opinion reported at 430 F. 2d 106, is deleted. However, with respect to the Friedland report, we believe that under the circumstances it was properly received in evidence.

We have considered all the other grounds advanced in the petition for rehearing, and deny the petition except as noted above.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

MILTON SILVERMAN, *Defendant-Appellant,*
(and another case).

Order on Rehearing

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

December 11, 1970

APPENDIX D

Opinion of Judge Palmieri Dated April 30, 1969, Denying Motion in Arrest Judgment

CR 181 Opin 441

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 35826

(Filed April 30, 1969)
4:30 P.M.

S.D. of N.Y.

68 CR. 762

UNITED STATES OF AMERICA
v.
MILTON SILVERMAN, *Defendant.*

PALMIERI, J.

This motion for arrest of judgment raises narrow issues of criminal pleading. Essentially the question presented is whether the wording of the indictment is so defective as to warrant the sanction of dismissal, The defendant, Milton Silverman, was charged with the misuse of union funds and was found guilty, after a jury trial, on sixteen counts of an eighteen count indictment. As president of Local 810 of the International Brotherhood of Teamsters (IBT), and as business manager of Local 1614, International Brotherhood of Electrical Workers (IBEW), as well as administrator of the United Wire, Metal and Machine Health and Welfare Fund, and the United Wire, Metal and Machine Pension Fund, the defendant Silverman exercised considerable influence and control over the use and disposition of the funds of these labor organizations.

At no point has the defendant claimed prejudice or surprise. His position is simply that the indictment is not properly worded.

THE INDICTMENT

Counts one through thirteen of the indictment charge misuse of union funds in violation of 29 U.S.C. 501(c), which is part of the Labor-Management Reporting and Disclosure Act of 1959.[1] This statute was enacted to eliminate improper practices by those involved in or connected with labor organizations and to encourage the "highest standards of responsibility and ethical conduct"[2] in the administration of labor organization affairs, and provides a broad regulatory pattern to aid in the attainment of those goals.

Count fourteen of the indictment charges misuse of the funds of an employee welfare benefit plan in violation of 18 U.S.C. 664. Counts fifteen through seventeen charged that the defendant made false statements in reports required to be filed with the Department of Labor, in violation of the reporting provisions of the statute involved in counts one through thirteen, and specifically in violation of 29 U.S.C. 439(b). Count eighteen charged the making of false entries in the books and records of Locals 810 and 1614, in violation of 29 U.S.C. 439(c). The indictment and the relevant statutory provisions are set forth in the margins.[3]

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[1] This act is popularly known as the "Landrum-Griffin Act."

[2] 29 U.S.C. 401(a).

[3] The indictment reads as follows:

"COUNTS ONE THROUGH THIRTEEN

The Grand Jury Charges:

On or about the dates hereinafter set forth in the Southern District of New York, MILTON SILVERMAN, the defendant, unlawfully, wilfully and knowingly, direcly and indirectly, did embezzle, steal, abstract and convert, to his own use, and the use of another, monies, funds, securities, property and other asserts of a labor organization of which he was an officer and by which he was employed, to

After a trial of seven days, which began on March 6, 1969, and ended on March 14, 1969, the jury found the defendant guilty as charged on counts one through fifteen, and count eighteen, and not guilty on counts sixteen and seventeen.

(Footnote 3 continued)

wit, Local 810, International Brotherhood of Teamsters and Local 1614, International Brotherhood of Electrical Workers, as hereinafter set forth.

Count	Date	Amount
1	October 27, 1965	$2581.37
2	November 29, 1965	581.38
3	January 31, 1966	500.00
4	February 16, 1966	300.00
5	March 24, 1966	400.00
6	April 20, 1966	400.00
7	May 24, 1966	200.00
8	June 21, 1966	200.00
9	July 2, 1966	1200.00
10	December 7, 1965	2000.00
11	December 7, 1965	2000.00
12	December 13, 1966	2000.00
13	December 13, 1966	2000.00

(Title 29, United States Code Section 501(c), Title 18, United States Code, Section 2)

COUNT 14

The Grand Jury further charges:

On or about the 18th day of July, 1968 in the Southern District of New York, MILTON SILVERMAN, the defendant, unlawfully, wilfully and knowingly did embezzle, steal, abstract and convert to his own use and the use of another, moneys, funds, property and other assets, to wit, one thousand dollars, of an employee welfare benefit plan, to wit, the United Wire, Metal and Machine Health and Welfare Fund, 10 East 15th Street, New York, New York.

(Title 13, United States Code, Section 664)

COUNTS FIFTEEN THROUGH SEVENTEEN

The Grand Jury further charges:

On or about the dates hereinafter set forth in the Southern District of New York, MILTON SILVERMAN, the defendant, unlaw-

The Evidence

The evidence was presented mainly through the testimony of various union members and others who had professional associations with the unions. It would have supported factual conclusions by the jury to the following effect:

In August and September, 1965, Silverman received calls from various persons, including a prominent political

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(Footnote 3 continued)

fully did make false statements and representations of material facts, knowing them to be false, in documents and reports required to be filed with the Secretary of Labor under the provisions of Title 29, United States Code, Sections 431 through 440, in that MILTON SILVERMAN, the defendant, who was then and their [sic] President of Local 810, International Brotherhood of Teamsters, did state in Form LM-2, Labor Organization Annual Reports hereinafter set forth that the amounts hereinafter set forth were true, correct and complete to the best of his knowledge and belief, whereas in truth and in fact, as the defendant then and there well knew, said amounts were not true, correct and complete to the best of his knowledge and belief.

Count	Report Ending	Item No.	Total Reported	Part of Total Falsely Reported
15	December 31, 1965	58	$29,835.00	$2581.37
16	December 31, 1965	69(d)	8,620.00	2000.00
17	December 13, 1966	69(e)	19,905.00	2000.00

(Title 29, United States Code, Section 439 (b).)

(Title 18, United States Code, Section 2.)

COUNT EIGHTEEN

The Grand Jury further charges:

From on or about the 1st day of January, 1965 to on or about the 31st day of December 1966 in the Southern District of New York, MILTON SILVERMAN, the defendant, unlawfully, willfully and knowingly did cause false entries to be made in books, records, reports and statements, to wit, the cash book, minute book and general ledger, of a labor organization engaged in an industry affecting commerce, to wit, Local 810, International Brotherhood of Teamsters, and Local 1614, International Brotherhood of Elecleader, requesting the Local 810 and Local 1614 make political contributions to the then pending mayoralty cam-

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(Footnote 3 continued)

trical Workers required to be kept by said labor organization pursuant to Title 29, United States Code, Section 436.

(Title 29, United States Code, Section 439(c)).

Title 18, United States Code, Section 2)."

The statutes involved, in their relevant sections, are:

29 U.S.C. 501(c)

"Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

18 U.S.C. 664

"Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

"As used in this section, the term 'any employee welfare benefit plan or employee pension benefit plan' means any such plan subject to the provisions of the welfare and Pension Disclosure Act."

29 U.S.C. 439(b)

"Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

29 U.S.C. 439(c)

"Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

paign in New York City headed by Abraham Beame. Silverman responded that his unions would make contributions, and in the latter part of September, 1965, both locals approved generally worded resolutions of support for political candidates, authorizing the president to make reasonable expenditures and approving all previously made expenses. By check dated October 27, 1965, Local 810 paid a bill submitted by Scoop Printing Company in the amount of $2,581.37. This bill was dated August 27, 1965, and indicated that it was for various types of stationery. It was, in fact, for printing done in connection with the political campaign. Payment of this bill was specifically approved by the defendant. By a series of checks, beginning November 29, 1965, Local 1614 paid to Scoop a total of $2,581.38 on a similarly labeled bill dated September 7, 1965. Silverman also approved this payment. An attorney and former City official who acted as the political campaign administrator was called as a government witness and made it quite plain that these "printing" payments constituted a covert means of channeling funds into the campaign.[4]

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[4] He testified on cross-examination as follows:

> "Q. As an attorney, as a former assistant controller, and as the campaign administrator for the 1965 campaign, can you tell us why Scoop Printing in that year sent phony bills to corporations for various kinds of printing?
>
> * * *
>
> A. I'm quite certain that Scoop invoices were sent to various corporations. Whether they were sent by Scoop or the campaign committee I'm not quite certain. But the reason they were sent to these corporations was to get these corporations to contribute to the campaign in a devious way." (Transcript, pp. 343-344)

Implicit in this testimony and other proof in the case, was a showing that there had been a concerted and successful attempt to "defeat or evade" income taxes due to the United States (Title 26 U.S.C. 6672) by the fabrication of false business deductions by way of spurious printing expenses.

At the time these sums were authorized and paid, Local 1614 had a deficit. The resolutions under which Silverman purported to act were not intended to authorize the contributions which were made but, particularly in view of the financial condition of Local 1614, were intended to authorize substantially smaller amounts. It could be reasonably inferred that the defendant Silverman used his powerful hold over the unions and other union leaders to defray funds from the union treasuries without the full and knowing authorization of the respective union memberships.

In July of 1966, the IBT held a convention at Miami Beach, Florida. For their expenses at that convention, each of the union delegates, of which Silverman was one, was entitled to $800. Before Silverman left, however, he secured a blank check, already signed by the Secretary-Treasurer of the union, and during the convention used that check to defray the cost of personal expenses to the extent of $1,200. This expenditure was not authorized and was a misuse of union funds within the purview of the statute (Count nine). In December of both 1965 and 1966, both Local 810 and Local 1614 extended to the defendant Silverman allowances of $2,000 for "Christmas gratuities", a total of $8,000.00 which Silverman was authorized to use for union purposes. The authorization for these allowance, though somewhat dubious and not clearly spelled out, was nevertheless apparently given by those privy to union management. The evidence established that he converted that money to his personal use in violation of the duty he owed to the two unions. (Counts ten through thirteen).

Count fourteen related to defendant's wrongful conversion of $1,000.00. During the summer of 1966, Local 810 had purchased a building which it was renovating for use as union headquarters. During the course of that renovation a large air-conditioning unit was removed from the second floor of the building. The air-conditioner was sold to a junk dealer and the proceeds of the sale, $1,000.00, rightfully belonged to the United Wire, Metal and Machine Health and Welfare Fund. The construction superintendent at the building site testified, however, that he gave the defendant Silverman the $1,000.00 which had been previously paid by the scrap dealer who bought the unit. The receipt of this $1,000.00 was never reflected in the union books, and it could be concluded that the defendant converted this money to his own use.

Count fifteen related to the falsity of reports required by statute to be filed with the Secretary of Labor.[5] These reports were referred to frequently at trial as the "LM reports."[6] These reports incorrectly listed the political contribution, which was the subject of Count one, as an office and administrative expense, and Silverman knew this to be false.

No issue was raised with respect to Count eighteen. It related to the falsification of the 1965 minute books of both Local 810 and Local 1614 after the defendant became aware that he was under investigation.

THE ISSUES RAISED BY DEFENDANT'S MOTION IN ARREST OF JUDGMENT RELATE SOLELY TO THE WORDING OF THE INDICTMENT

Rule 34, Fed. R. Crim. P., provides in part as follows: "The court on motion of the defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. . . ."

Defendant argues that each of Counts one through seventeen is insufficient on its face to charge a federal offense.

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[5] 29 U.S.C. 431(b).

[6] Presumably the letters "LM" stand for labor-management.

Counts one through thirteen are claimed to be defective in that they nowhere allege that Locals 810 and 1614 are labor organizations engaged in an industry affecting commerce. Since such engagement is an essential element of an offense under 29 U.S.C. 501(c), defendant argues that the failure of the indictment to allege such a connection renders it ineffective as a proper charging instrument.

Count fourteen is alleged to be defective both for the reasons stated in the preceding paragraph and additionally because it fails to allege that the United Wire, Metal and Machine Health and Welfare Fund, to which it specifically refers, is subject to the Welfare and Pension Plans Disclosure Act, 29 U.S.C. 301.

Count fifteen is alleged to be defective for the same reasons put forth with regard to counts one through fourteen, and for the further reason that it fails to allege that the labor organization involved was a labor organization subject to the provisions of 29 U.S.C. 421-440.

Modern Criminal Pleading Has Moved Very Far From Its Common Law Underpinnings

The problem raised by the defendant's motion in arrest of judgment is solely one of criminal pleading. While it is true that an indictment must allege all the essential elements of an offense, Fed. R. Crim. P. 7(c); *United States* v. *Seeger*, 303 F. 2d 478, 483 (2d Cir. 1962), the formalistic and ponderous pleadings required by the common law are no longer necessary. As early as 1872 Congress acted to soften the harsher effects of common law rules of pleading by providing that "no indictment . . . shall be deemed insufficient . . . which shall not tend to the prejudice of the defendant," 17 Stat. 198,[7] and this attitude has been embraced by the courts ever since. As the Supreme Court said in *Smith* v. *United States,* 360 U.S. 1, 9 (1959):

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[7] This statute has since been repealed, but its substance has been retained by Fed. R. Crim. P. 52(a) which mandates the disregard of errors which do not affect substantial rights. See United States v. Russell, 369 U.S. 749, 762 (1962).

> "This Court has, in recent years, upheld many convictions in the face of questions concerning the sufficiency of the charging papers. Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused. This has been a salutary development in the criminal law."

This trend toward rejection of the unnecessary and burdensome pleading which characterized the older indictments was reflected by the enactment of Fed. R. Crim. P. 7, which was intended to simplify the forms of criminal pleading as the original committee notes make clear.[8] "One of the laudable reforms of the Federal Rules of Criminal Procedure was to eliminate the necessity for much of the cumbersome claptrap which typically encased the common law indictment." *Honea* v. *United States,* 344 F.2d 798, 804 (5th Cir. 1965). This liberalization, of course, in no way derogates from the "substantial safeguards"[9] which the indictment is intended to protect. The issue for the Court, however, is no longer whether the mysteries of common law pleading have been mastered but whether the defendant has been afforded the protections to which he is entitled. See *United States* v. *Russell,* 769 U.S. 349 (1962); *United States* v. *Smith, supra; United States* v. *Debrow,* 346 U.S. 374 (1953).

This emphasis on criminal pleading as a "practical thing", *United States* v. *Lamont,* 236 F.2d 317 (2d Cir. 1956), has been augmented by the provisions of Federal Rule of Criminal Procedure 7(f), which provides that a court may order the filing of a bill of particulars. The 1966 committee note[10] to this paragraph points out that in amending this rule by eliminating the necessity for the showing of cause, the intention was to encourage a more liberal attitude by the courts toward bills of particulars, and thus, it may be assumed, allow such bills a more important role in the new pleading. In view of this, it is significant that despite the opportunity to do so during approximately seven months between the filing of the indictment and the trial, the defendant made no effort to have clarified the matters to which he now objects.

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[8] Original Committee Note to Subdivision (c), Fed. R. Crim. p. 7.

[9] United States v. Smith, at 9.

THE DEFENDANT DOES NOT CLAIM PREJUDICE BY THE ALLEGATIONS OF THE INDICTMENT NOR DOES THE RECORD SUPPORT ANY FINDING OF PREJUDICE

Federal Rule of Criminal Procedure 7(c) provides in part that "the indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." This requirement is intended to be consonant with two constitutional provisions —the Sixth Amendment right to be informed of the nature and cause of the accusation in order to permit the preparation of a proper defense; and the Fifth Amendment protection against being placed in jeopardy twice for the same offense. See *Moore, Federal Practice* (2d ed. 1968), 7.04 at pages 7-15; *United States* v. *Debrow, supra,* at 376. As the Supreme Court said in *United States* v. *Russell, supra*:

> In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of the indictment is to be measured. These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he

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[10] 1966 Committee Note to Subdivision (f), Fed. R. Crim. p. 7.

> must be prepared to meet,' " and, secondly, " 'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' (Citing cases)" 369 U.S. at 763, 764.

Defendant has not argued that the evidence as submitted was insufficient to sustain a conviction under the statutory sections under which he was tried, nor does he claim that the charge of the Court was incorrect. He alleges merely that the indictment is itself invalid because of its verbal composition. Measured by the standards set forth in the preceding paragraph, I am constrained to regard the claim as unjustified. There is no doubt that any differences in wording between this indictment and a more detailed indictment under this statute, did not work any discrenible prejudice to defendant's case. In *United States* v. *Doyle,* 318 F.2d 419 (8th Cir. 1963), a criminal prosecution also brought under 29 U.S.C. 501(c), the indictment alleged that the affected labor organization was "a labor organization engaged in an industry affecting commerce as defined by Section 402(i) and 402(j), Title 29 United States Code." 318 F.2d at 421. Conceivably one might prefer the more precise wording of the indictment in the *Doyle* case, but such a preference would be a preference of style, not a difference in treatment of the defendant's substantive rights.

It is quite apparent from the trial record that the defendant was fully aware of the charges against him, of the nature of the proof necessary to sustain those charges under the law, and of the nature of the most efficacious defenses to those charges. The indictment left room for no element of surprise in the issues raised by the Government at trial with perhaps the exception of a problem relating to identification of a particular asset—the airconditioner which was the subject of count fourteen. This was resolved prior to the commencement of trial through a bill of particulars and communications between the attorneys on the record. It would seem entirely reasonable, apart from what has just been said, to suppose that the defendant, a long-time union leader and the president of Local 810 and the business manager of Local 1614, was fully aware that the unions with which he was connected had extensive interstate contacts and represented employees engaged in industries affecting commerce.

With respect to any alleged defect relating to the ability of the defendant to plead the conviction in a later action in order to assert his right to be free from double jeopardy there can be no claim of prejudice. The judgment is clear and unequivocal. The acts charged in each count of the indictment are specific and are expressly circumscribed by dates and amounts. Should any attempt at further prosecution arise, therefore, the transactions which were the basis for this action could be easily identified and isolated. It is thus difficult to foresee that any problem of ambiguity would result from this judgment with respect to the question of double jeopardy. *Cf., United States* v. *Russell, supra* at 764.

THE LANGUAGE OF THE INDICTMENT WAS SUFFICIENT

A. *Counts One Through Thirteen*

The indictment charges the defendant with certain actions while an officer of a labor organization in violation of 29 U.S.C. 501(c). The language of the indictment follows the language of the statute. It is clear from the charge itself and the citation to section 501 at the bottom of the count that the statutory language is being relied upon to present the charge against the defendant.[10a] This is not a case, as defendant argues, which raises the same issues raised in *United States* v. *Guterma,* 189 F. Supp. 265 (S.D.N.Y. 1960). In sustaining indictments in that case the court stated that though the statutory language is sufficient when it embodies all the elements of the crime so that it clearly informs defendants of the charges they must meet and allows them to plead the judgment in bar of further prosecutions for the same offense, that language is not sufficient if it omits an essential element of the offense or includes it only by implication. It further stated, however, in discussing *United States* v. *Carli,* 105 U.S. 611 (1882), 26 L. Ed. 1135, a case where the essential element that defendant had knowledge that he was committing an illegal act had been omitted from the statute, that "if the statute includes generic terms, describing only the general nature of the offense, statutory language is insufficient." 189 F. Supp. at 270.

[10a] While it is true that Fed. R. Crim. p. 7(c) provides that error in the citation shall not be ground for dismissal or reversal if the error does not mislead the defendant to his prejudice, thus preserving to some extent the common law view that citations are not necessary to the validity of the indictment, *see* Orfield, *Indictment*

Generic language is not at issue here, however, because the terms in the statute (29 U.S.C. 501(c)) redefined in such a way as to leave no room for ambiguity. In the very same chapter as 501, that is chapter 11 of Title 29, 402(i) states that "the term 'labor organization' as used in this chapter shall mean a labor organization in an industry affecting commerce." Thus defined the term "labor organization" as used in the indictment is a term of art, and as such it is not restricted to its colloquial meaning but is instead invested with the meaning attributed to it by the statute under which the indictment was brought. When a term has been defined by statute in such a manner as to limit its application to a class of items smaller than

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and Infomation in Federal Criminal Prosecution, 13 SYRACUSE L. REV. 218, 245-247 (1961) and cases cited therein, Rule 7(c) also requires that the proper statutory citation be given, pursuant to that rule the correct citations were given in the indictment in this case. These citations are deemed relevant to any construction of the indictment and have been so treated in the course of the discussion in the text.

the class which would be described if the term were used in its purely colloquial or literal sense, and when it is clear from the context that the statutory meaning is intended, it may properly be deemed to have the connotation attributed to it in the statute. To do otherwise would negate the meaning ascribed to the word by Congress, and would render 402(i) ineffectual. *Cf., United States* v. *Lenroot*, 323 U.S. 490, 502 (1945); *Labor Union* v. *Coca Cola*, 350 U.S. 264 (1956); *United States* v. *Quong*, 303 F.2d 499, 503 (6th Cir. 1962), *cert. denied* 371 U.S. 863. Since this is so, it is reasonable that if proper notice is given that 501(c) is being relied upon for a charge, and when the charge is couched in the language of 501(c), that the term "labor organization" as used in the indictment be deemed to have the same meaning as the term "labor organization" as used in 501(c). Since in the statute the term is expressly defined as a labor organization in an industry affecting commerce, the use of that term in an indictment which follows the statutory language and which specifically refers to the statute, is at least sufficient to charge that the particular labor organization involved is one in an industry affecting commerce.

It has been suggested that *Stirone* v. *United States*, 361 U.S. 212 (1960) should be dispositive in favor of the defendant. That case, however, and the case on which it relies, *Ex Parte Bain*, 121 U.S. 1 (1887), go to the question of whether the court may in effect amend the indictment of the grand jury by permitting a defendant to be tried on charges not specifically made by the grand jury. That question is not here involved. In *Stirone*, a case brought under the Hobbs Act,[11] the indictment charged extortion in connection with interstate commerce, and the commerce which was alleged related to the shipment of sand from outside the State of Pennsylvania. The court charged, however, that the commerce aspect could be proved either with reference to the shipments of sand, or by finding that the sand was being used in connection with the construction of a mill which " 'Would manufacture articles of steel to be shipped in interstate commerce . . .' from Pennsylvania into other states." 361 U.S. at 214. The Supreme Court held that by allowing proof of the commerce requirement to rest on the "steel" shipments, the district court had failed to protect the "defendant's substantial right to be tried only on charges in an indictment returned by a grand jury." No issue of amendment is raised in Counts one through thirteen or in Count fifteen of this indictment. All that is at issue here is whether the language of the indictment is sufficient to charge a federal offense.

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[11] 18 U.S.C. 1951; 62 Stat. 793.

In *United States* v. *Varlack*, 225 F.2d 665 (2d Cir. 1955) a case which also arose under the Hobbs Act, the indictment alleged that the activities of the defendants affected "commerce" but failed to state that the commerce affected had been interstate or foreign commerce. In upholding the indictment in *Varlack* the Court of Appeals said:

> "There can be no doubt that congressional jurisdiction to enact this statute is bottomed upon the powers conferred upon the national legislation by the Interstate and Foreign Commerce Clause of the Constitution, Art. 1, 8, cl. 3. It is equally clear that by defining the word 'commerce' as used in the act to include only interstate and foreign commerce, the legislature acted within the bounds of its constitutional authority. The indictment might well have contained a reference to the nature of the commerce affected and to clarifying details suggested by the appellant. *The question before us however, is not whether the indictment filed is, in all respects, the best that could have been drafted but rather, whether the omission alluded to so completely denuded the charges of so much information data as to deprive appellant of*

> *his right to be apprised of the charge he was required to meet and to be protected against being tried twice for the same offense. This test is a practical one and one which may be met despite the fact that the indictment could have been made more certain and definite.* We are satisfied that the indictment did fulfill at least these minimum requirements." (Emphasis added)

This is very similar to the situation in this case. The indictment charges the offense in the language of the statute, and the definition given to the terms by the statute itself make it clear that the acts charged are properly a subject for federal adjudication. There is no claim that 402(i) is constitutionally infirm. Nor, as was pointed out above, can it be persuasively argued that under any practical test defendant has been adversely affected or has suffered any prejudice from the particular wording of the indictment. Counts one through thirteen should therefore stand.

B. *Count Fourteen*

Count fourteen alleges that the defendant did embezzel, steal, etc. moneys of "an employee welfare benefit plan." The language of the indictment substantially follows the language of the cited statute, 18 U.S.C. 664, which provides in an unquoted paragraph that the "term 'any employee welfare or benefit plan' means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act." That act provides, 29 U.S.C. 303(a), that it applies to "any employee welfare or pension benefit plan if it is established or maintained by any employer or employers engaged in commerce or any industry or activity affecting commerce or by any employee organization or organizations representing employees engaged in commerce or any industry or activity affecting commerce or both."

As defined in 18 U.S.C. 664, and as utilized in 29 U.S.C. 303(a), it is clear that the term "employee welfare benefit plan" is a term of art which is entitled to the same treatment afforded the term "labor union" insofar as its use is relied upon to allege the necessary connection with interstate commerce. See pages 17-19 *supra*. See also, *United States* v. *Lenroot, supra,* and *Labor Union* v. *Coca Cola, supra.* Section 303 clearly applies only to welfare plans which have the connection with commerce necessary to sustain the jurisdiction of a United States court, and an allegation that the plan is subject to the Welfare and Pension Plans Disclosure Act is thus sufficient to allege that the plan is established by an employer or employee organization which is engaged in commerce or is in an industry affecting commerce.

Defendant argues that there is no allegation that the plan in question is covered by the welfare plan disclosure act. This contention must be rejected. It is true that there is no specific reference to that act. Nevertheless, a reading of the statutory section cited at the bottom of Count fourteen erases any reasonable uncertainty as to whether the plan in question is alleged to be covered. The second paragraph of that section makes it clear that the only type of welfare plan to which the cited section is relevant is one which is covered by the Welfare and Pension Plans Disclosure Act. To say that the term "employee welfare benefit plan" could be used, the statutory language followed, and the statute cited, and that it is nevertheless not clear that the plan is alleged to be covered by the act, would be to strip the second paragraph of 664 of any significance whatsoever. This would not be proper since it is clear to any reader of the indictment that the "employee welfare benefit plan" referred to in the indictment is one covered by the Welfare and Pension Plans Disclosure Act and one which bears a significant and sufficient relationship to interstate commerce. Consonant with the criteria of "practicality" enunciated in *Lamont* and *Varlack, supra,* therefore, count fourteen is adequate to charge a federal offense.

C. *Count Fifteen*

Defendant argues that this count is defective because it alleges neither that Local 810 is a labor organization, nor that it was engaged in an industry affecting commerce, nor that it was a labor organization subject to the provisions of 29 U.S.C. 431-440. A fair reading of the count, however, suggests the conclusion that the construction urged by the defendant is hyper-technical, and not consonant with the view expressed above that an indictment should be read in a practical manner and with a recognition of its essentially informative nature. So examined, Count fifteen meets the requisite standard for both clarity and substance.

The body of the charge, contained in Count fifteen, alleges a violation with respect to the documents required to be filed with the Secretary of Labor under the provisions of 29 U.S.C. 431-440. It is provided by 29 U.S.C. 431(b) that "every labor organization shall file annually with the Secretary" certain financial reports therein described. That section is applicable only to labor organizations, and since the term "labor organization" is defined in 29 U.S.C. 402(i), there is no ambiguity about what constitutes a labor organization within the ambit of 431. Furthermore, as discussed previously, when thus called into plan, the term "labor organization" is a term of art which is sufficient to allege that the labor organization involved is engaged in interstate commerce. Since it also alleges a violation of the reporting requirements of the statute, therefore, the count sufficiently alleges a violation of federal law. It should be noted that like the charges in Counts one through thirteen, the charge in Count fifteen could hardly have been more specific. It names the labor organization involved, the position held by the defendant, the form required to be filed, and the particulars, including the date, item number, and amount, of the falsely reported information. Clearly no right of the defendant has been violated by the manner in which the indictment charges a violation of federal law, and the attack on Count fifteen must therefore fail.

Although neither side cited it to the Court, the case of *United States* v. *Cox,* 285 F. Supp. 367 (E.D. Wis. 1968), can be read as lending support to the defendant's position. The indictment there attempted to charge a violation of 18 U.S.C. 2113 (a) and (4), which relate to robbery of a federally insured bank. Neither paragraph (a) nor paragraph (d) of that statute, both of which were cited in the indictment, which followed the language of those sections, made any reference to the insured nature of the banks to which they applied. Paragraph (f) of the same section, however, provided that as used in that section "the term 'bank' means any . . . bank the deposits of which are insured by the Federal Deposit Insurance Corporation." Although the court specifically found that the absence of the allegation with respect to the insured nature of the bank, which evidently was not in dispute (see footnote one at 285 F. Supp. 368), had caused no prejudice to the defendant, it nevertheless declined to consider the uncited portion of the statute as forming any part of the meaning of the indictment, and held it invalid. It may be noted in passing, that the court in the *Cox* case took judicial notice of the large number of uninsured banks and concluded that the indictment which failed to allege the fact of federal insurance would thus be ambiguous. It is by no means clear that a comparable assumption would be warranted with respect to labor unions like the ones here involved which are not only labeled "international" but which are notoriously of an interstate character. To the extent, however, that the conclusions here expressed may be deemed to be in conflict with *United States* v. *Cox,* I am constrained to dissent from the views expressed in that case and to regard them as reflecting standards for measuring the sufficiency of an indictment which are not wholly appropriate to the present state of criminal pleading.

CONCLUSION

The question here is whether, in the absence of prejudice and surprise, and notwithstanding the fact that the crimes involved were concededly defined and explained to the jury with sufficient explicitness, the defendant may nevertheless fault the prosecution by a claim that magic words were not used in the indictment. Preciousness of pleading is out of date. Since each of the counts one through fifteen sufficiently alleged the essential facts of the offenses sought to be charged and since they do so with sufficient clarity and certainty to appraise the defendant of the charges against him, and since the record shows with accuracy the offenses of which the defendant was convicted, the indictment is sufficient and the motion in arrest of judgment must be denied.

It is so ordered.

APPENDIX E

Statutes and Rule Involved

TITLE 18, UNITED STATES CODE

Section 664. *Theft or embezzlement from employee benefit plan.*

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, [commits a crime].

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act.

WELFARE AND PENSION PLANS DISCLOSURE ACT (TITLE 29, UNITED STATES CODE, CHAPTER 10 [SECTIONS 301-309])

* * * * *

Section 302. *Definitions*

(a) When used in this chapter—

(1) The term "employee welfare benefit plan" means any plan, fund, or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by any employer or by any employee organization, or by both, for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment.

* * * * *

(10) The term "commerce" means trade, transportation, or communication among the several States, or

between any foreign country and any State, or between any State and any place outside thereof.

(11) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce. . . .

* * * * *

Section 303. *Plans within chapter.*

(a) . . . [T]his chapter shall apply to any employee welfare or pension benefit plan if it is established or maintained by any employer or employers engaged in commerce or in any industry or activity affecting commerce or by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce or by both.

* * * * *

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (TITLE 29, UNITED STATES CODE, CHAPTER 11 [SECTIONS 401-531])

Section 402. *Definitions.*

For the purposes of this chapter—

(a) "Commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * *

(c) "Industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce. . . .

* * * * *

(i) "Labor organizations" means a labor organization engaged in an industry affecting commerce. . . .

(j) A labor organization shall be deemed to be engaged in an industry affecting commerce if it—

> (1) is the certified representative of employees under the provisions of the National Labor Relations Act.

* * * * *

Section 431. *Report of labor organizations.*

* * * * *

(b) *Annual financial report; filing; contents.*

Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information . . . —

* * * * *

> (3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer . . . who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it. . . .
>
> (4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year. . . .

* * * * *

> (6) other disbursements made by it including the purposes thereof. . . .

* * * * *

Section 439. *Violations and penalties.*

* * * * *

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter [commits a crime].

(c) Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provisions of this subchapter [commits a crime].

* * * * *

Section 501. *Fiduciary responsibility of officers of labor organizations.*

* * * * *

(c) *Embezzlement of assets; penalty.*

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, [commits a crime].

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

* * * * *

Rule 7. *The indictment and the information.*

* * * * *

(c) *Nature and Contents.*

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

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421-630—71

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1334

MILTON SILVERMAN, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–40a) is reported at 430 F. 2d 106. The amending opinion on rehearing (Pet. 42a–43a) is not reported. The opinion of the district court (Pet. 44a–64a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1970 (Pet. 41a). A petition for rehearing was denied (except for a minor deletion from the original opinion) on December 11, 1970 (Pet. 42a–43a). Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to February 9, 1971, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an attorney previously retained to examine union records could, consistently with the attorney-client privilege, be questioned at trial about the contents of those records at the time of his examination.

2. Whether counts of an indictment charging embezzlement and conversion of funds from named unions failed to charge offenses because they did not allege in express terms that each union was a labor organization in an industry affecting commerce.

3. Whether the evidence was sufficient to sustain the convictions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on sixteen counts (counts one through fifteen and count eighteen) of an eighteen-count indictment charging embezzlement from, and falsification of records and reports of, certain unions. Counts 1 through 13 charged embezzlement and conversion of monies of two local unions in violation of 29 U.S.C. 501(c); count 14 charged embezzlement of money of an employee welfare benefit plan of another local union in violation of 18 U.S.C. 664; count 15 charged violation of 29 U.S.C. 439(b) in the false reporting on a Labor-Management Report of the money referred to in count 1; and count 18 charged that petitioner caused false entries to be made in the books and records of the two local unions in violation of 29 U.S.C. 439(c).[1] Petitioner was sentenced to concurrent four-month prison terms on counts one through fifteen, and to a consecutive four-month term on count eighteen; he was also fined $1,000 on each count. The court of appeals unanimously affirmed the conviction as to counts nine through fifteen and count eighteen. With one judge dissenting, it reversed the convictions on counts one through eight (Pet. 1a–36a; 37a–40a).[2]

1. The evidence (the sufficiency of which is challenged only as to counts (10–13) is set forth in some detail in the opinion of the court below (Pet. 2a–3a, 18a–22a, 24a–27a) and, to a lesser degree, in the opinion of the district court denying petitioner's motion for arrest of judgment (Pet. 47a–51a). In 1965 and 1966, petitioner was the principal officer of affiliated labor organizations: he was the president of Teamsters Local 810, business manager of Electrical Workers Local 1614 and the administrator and trustee of an affiliated union's welfare and pension funds. The government's case showed that petitioner embezzled various sums from the organizations under his control and falsified union records and reports made to the Department of Labor in order to conceal the embezzlements. In brief, the evidence on the various counts upon which the convictions were affirmed, was as follows:

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[1] The statutory provisions on which these counts were based are set out at Pet. 65a–68a.

[2] The Court's opinion (except as to the reversed counts upon which he dissented) was written by Judge Moore. An opinion by Judge Friendly, joined by Judge Hays, represents the decision of the panel on the reversed counts.

Count 9. In July 1966, petitioner used a blank union check to defray personal expenses of $1,200 at a union convention. All the delegates (including petitioner) were entitled only to $800 in expenses. The amount expended by petitioner was without union authorization (Pet. 50a).

Counts 10 through 13. In December 1965 and again in December 1966, Local 810 and Local 1614 each issued $2,000 checks to petitioner that were carried on the books as steward's committee expenses (Pet. 18a). There was no authorization for the 1966 payments (Tr. 261–262, 283, 301) and two members of the executive board of the locals had no recollection of any resolution authorizing the 1965 payments (Tr. 260–262, 283, 296–299, 301). The minutes of the December 3, 1965, executive board meeting which purported to authorize the 1965 payments were typed on a typewriter not used in the preparation of the other pages of the minutes of that meeting or of any other papers of the minute books (Tr. 580–587, 600). Jacob Friedland, an attorney, retained to examine the records of Local 810 before they were produced before the grand jury in 1967, but after the subpoena had been issued for their production, testified that the December 3, 1965, minutes had been changed to show authorization of a loan of $2,000 to petitioner between the time Friedland saw them in 1967 and the time they were exhibited to him at trial (Tr. 978–983).

Count 14. During the renovation of a building in the summer of 1966, a large air-conditioning unit belonging to the welfare fund of which petitioner was a trustee was sold to a scrap dealer for $1,000. The cash proceeds were pocketed by petitioner after being placed on his desk and were never turned over to the welfare fund (Tr. 399–401, 537–538; Pet. 21a–22a, 50a–51a).

Count 15. The required 1965 annual report of Local 810 filed with the Secretary of Labor[3] included a payment of $2,581.37 to Scoop Printing Company, which was referred to in the report as "Office and Administrative Expenses." The money had in fact been used for the benefit of a slate of local political candidates (Tr. 347–354) and was paid by a check signed by petitioner, purportedly for stationery items ordered by the union (Tr. 115–117; Pet. 9a). Petitioner approved the payment with full knowledge of its use in the political campaign (Tr. 833–834). Petitioner also signed the report as the local's president after discussing it with the accountant who prepared it (Tr. 249–254).

Count 18. The required books and records of the two local unions showed false entries as to the bills from the Scoop Printing Company and the Behl Printing Company, and falsely carried the payments referred to in counts 10–13 as committee expenses (Pet. 9a–10a, 25a, and notes 11 and 12). The records also included the altered minute books (Pet. 25a).

2. In February 1967, after Local 810 received a grand jury subpoena *duces tecum* for the production of its records (including its minutes), Jacob Friedland, the attorney previously referred to, was retained

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[3] This report was required by the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 431(b) (see Pet. 67a).

to review these records, including the minutes of the Executive Committee for December 3, 1965. He prepared a report of his examination of these records and was paid for this service by the union, to which he had submitted a bill (Tr. 468–469).[4] At trial, in March 1969, Friedland was called as a government witness. He testified that he had no independent recollection whether the December 3, 1965, minutes contained a paragraph showing that the committee authorized a $2,000 loan to petitioner and $2,000 as additional compensation to petitioner for money for use as Christmas gratuities (Tr. 468–469; Pet. 25a–26a). The government requested that he be allowed to look at his report (then in possession of an attorney for Local 810) for the purpose of refreshing his recollection about this particular paragraph in the minutes. The defense objected, claiming the attorney-client privilege (Tr. 475–476, 485, 611, 630). The trial court declined to rule on the motion until further evidence was adduced (Pet. 26a).

After evidence was introduced suggesting that the minutes had been fabricated in the manner charged, the trial court denied the claim of attorney-client privilege "because it was being pressed improperly on the basis of books which are properly producible and which have no cloak of secrecy surrounding them and on the further grounds that the purpose of pressing the claim of privilege is an unlawful purpose because the client who is pressing the claim is pressing it in order to frustrate an attempt to establish a very relevant fact in this case, namely whether these minute books were authentic books at the time they were produced for the government or whether they were partially fabricated" (Tr. 612–621).[5] At this point, Mr. Friedland claimed the privilege against self-incrimination (Tr. 637–638) and the government rested its case (Tr. 658).

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[4] Friedland testified he was retained by both the union and petitioner. The district court made no findings as to whether petitioner as well as the union was the client of the attorney (Tr. 609–611).

Thereafter, Mr. Friedland was granted immunity from prosecution and testified as a government witness on rebuttal. After examining his report, he said that his "memory has been refreshed with respect to these minutes and basing it entirely on the report, it indicates a change in the minutes" (Tr. 979). When asked to refresh his recollection as to the change, he stated that his report stated that "[t]here is a loan to Milton Silverman in December 1965 and there is no approval of this loan by the Executive Board" (Tr. 980; Pet. 27a). After Mr. Friedland left the stand, the court placed this sentence of the report into evidence as a court exhibit (Tr. 1000–1003). When defense counsel further objected to leaving out the next sentence, the court also placed it in evidence (Tr. 1003).[6] These were the only portions of the report introduced.

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[5] Before making this ruling, the trial judge (Judge Palmieri) consulted with Judge Murphy who had granted a pretrial motion to quash a subpoena for this report in its entirety (Tr. 628; Pet. 25a).

[6] This sentence reads (Tr. 1003): "There is a payment of $2,000 to Mr. Silverman in December 1965, for Christmas gifts and this requires an accounting of where the money was spent."

ARGUMENT

1. Petitoner broadly contends that Mr. Friedland's testimony concerning his report and other references to the report constituted a violation of the attorney-client privilege (Pet. 11–16). The court below analyzed this claim with utmost care and properly rejected it (Pet. 25a–29a).

It is settled that the attorney-client privilege "protects only those papers prepared by the client for the purposes of confidential communication to the attorney or by the attorney to record confidential communication * * *" *Colton* v. *United States,* 306 F. 2d 633, 639 (C.A. 2), certiorari denied, 371 U.S. 951. The minutes of Local 810 were not confidential. This is clear both under established legal principles regarding union records, *e.g., Curcio* v. *United States,* 354 U.S. 118, 122, and under the Labor-Management Reporting Act of 1959.[7] When that record was given to the attorney for examination as a prelude to delivery to the grand jury, its character as a union record did not change and the only portion of counsel's report relating thereto which was revealed at trial was "a description of the minutes as they appeared when presented" to him (Pet. 28a). Accordingly, there was here no disclosure of any confidential communication from the report nor any disclosure of any advice from Mr. Friedland to a client. The report was used merely to refresh Mr. Friedland's recollection of the contents of the nonconfidential minutes at the time when he had access to them. To urge, in these particular circumstances, that the use of the report violated the privilege is to propose the anomalous doctrine that documents which are not privileged when in the hands of the client somehow became clothed with immunity when turned over to an attorney. This seeks to press the privilege well beyond its recognized purpose of fostering the attorney-client relationship.[8]

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[7] See 29 U.S.C. 431(a)(5), (*c*), 436.

2. Counts 9 through 13 charged that petitioner embezzled and converted to his own use certain "assets of a labor organization of which he was an officer and by which he was employed, to wit, Local 810, International Brotherhood of Teamsters, and Local 1614, International Brotherhood of Electrical Workers," in violation of 29 U.S.C. 501(c) (Pet. 4a). This statute makes it a crime, *inter alia,* for a person to embezzle or convert to his own use money "or other assets of a labor organization of which he is an officer." A labor organization is defined by 29 U.S.C. 402 as one "engaged in an industry affecting commerce"; that section provides also that a labor organization shall be deemed to be engaged in an industry affecting commerce if it is the certified representative of employees under the

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[8] To support his assertion (Pet. 16) that the court below "departed from accepted judicial principles" with respect to the privilege in this case, petitioner seeks to rely upon the fact that the court "took the unusual step of deleting a major portion of the opinion dealing with this issue." The portion deleted was essentially a short discussion of Wigmore's views that only confidential communications between attorney and client are privileged (Pet. 28a–29a); it was removed only for the purpose of avoiding any impression that the court meant to engraft an exception to the attorney-client confidential communication rules (Pet. 42a–43a). If anything, ~~therefore~~, the deleted material underscored the court's conclusion that attorney Friedland's report did not fall into a protected category.

provisions of the National Labor Relations Act (see Pet. 3a–4a n. 1).

The claim that these counts, and related counts 14 and 15, were defective in not alleging in express terms that the labor organizations were engaged in an industry affecting commerce was properly rejected by the court below (Pet. 3a–9a), as it had earlier been by the district court in an extended opinion (Pet. 44a–64a). By using the term "labor organization" (as does the statute) and by particularizing two particular labor organizations, the indictment charged by necessary implication that the unions were labor organizations within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 and as such engaged in an industry affecting commerce under 29 U.S.C. 402. The indictment met the essential requirements of informing petitioner of the nature of the charge against him and prevents his being twice placed in jeopardy. See, *e.g., Russell* v. *United States,* 369 U.S. 749, 763–766. The argument that there may not have been evidence before the grand jury of interstate commerce (Pet. 18–19) is fully answered by the opinion below, upon which we rely in this respect (Pet. 3a–9a).[9]

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[9] Petitioner is in error in contending (Pet. 18–21) that the decision below conflicts with *Walker* v. *United States*, 342 F. 2d 22 (C.A. 5), certiorari denied, 382 U.S. 859, or *United States* v. *Carll*, 105 U.S. 611, both forgery cases. In *Walker*, the court found that the more reasonable construction of the allegation that appellant acted "with intent to defraud" was that the fraud was directed toward the business at which the checks were cashed rather than against the United States. In *Carll*, this Court found the indictment deficient because it omitted allegations of knowledge that the obligation was forged.

3. The challenge to the sufficiency of the evidence on counts 10–13 (involving the four $2,000 checks received by petitioner in 1965 and 1966) is that, although the evidence shows petitioner received money that belonged to the union, and did not file vouchers to show how it was spent, it fails to show that he spent it for nonunion purposes. The jury could have found, however, that there was no required authorizing resolution for these "Christmas gratuities." (See Statement, *supra* pp. 4–7.) In an embezzlement case, the government meets its burden of proof where, as here, it shows a wrongful receipt of money belonging to another. It does not have the burden of showing what the defendant did with the money after he took it. See *Doyle* v. *United States,* 318 F. 2d 419 (C.A. 8). The defendant may, of course, come forward with an affirmative defense; leaving it to him to do so is not to require him to prove his innocence, and the government does not have the burden of negating all such possible defenses.

Nor did the court below rely upon an improper standard in reviewing the conviction. Under *Glasser* v. *United States,* 315 U.S. 60, it was required to examine the evidence in the light most favorable to the prosecution. The decision in *In re Winship,* 397 U.S. 358, does not require a reviewing court to apply a "reasonable doubt" standard, it holds only that the trier of fact, not the reviewing court, must find guilt beyond a reasonable doubt in a criminal case.[10]

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[10] The decision in *United States* v. *Lynch,* 366 F. 2d 829 (C.A. 3), upon which petitioner relies (Pet. 26–27), turns, as the court below found (Pet. 19a), on its particular facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Several comments are appropriate in response to the Brief for the United States in Opposition:

1. The Solicitor General's Brief Misconceives the Nature and Importance of the Departure From the Attorney-Client Privilege

Quite incorrectly, the Solicitor General's brief (Opp. Br. 8-9) ascribes to petitioner "the anomalous doctrine that documents which are not privileged when in the hands of the client somehow became clothed with immunity when turned over to an attorney." Petitioner proposes no such doctrine. What petitioner does say is that the confidential comments and conclusions of the attorney respecting the union minutes—as well as the knowledge acquired by the attorney as a result of his conferences with his client—are clothed with the attorney-client privilege. To force disclosure of those comments, conclusions and such knowledge is to drive a dangerous wedge into the privilege and to create an ominous precedent boding ill to the confidential relationships between all attorneys and all clients.

The Solicitor General, of course, does not deny the appropriateness of granting certiorari, in the exercise of this Court's administration of criminal justice in the federal courts, to review and correct an unwarranted invasion of the established attorney-client privilege. Precisely that type of invasion occurred in this case. The nub of the invasion lay in the forced revelation of the portion of attorney Friedland's confidential communication to his client that stated that "[t]here is a loan to Milton Silverman in December 1965 and there is no approval of this loan by the Executive Board." * In an attempt to justify that invasion, the courts below reasoned that this confidential statement or observation of the attorney merely described the absence of any "approval of this loan" in the Executive Board minutes; and those minutes were said by the courts below to be "public records" under the Landrum-Griffin Act, though they are now

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* This statement from Friedland's confidential communication was used to refresh his recollection that the original version of the minutes contained no specific authorization for the loan in question. Such testimony was critical to the Government's proof under Counts 10-13 that unauthorized loans and payments had been made to petitioner Silverman. Oddly enough, the Government made no attempt to prove this lack of authority by other means, such as through cross-examination of the petitioner.

described by the Solicitor General as merely being "nonconfidential" in nature (Opp. Br. 8). Hence, it is said, such a physical description of the "nonconfidential" minutes as they were presented to the attorney could not constitute a "disclosure of any confidential communication from the report nor any disclosure of any advice from Mr. Friedland to a client" (Opp. Br. 8).

But it does not follow that any observation, description or conclusion respecting such "nonconfidential" minutes, drawn by the attorney in the course of a confidential communication to his client, partakes of the "nonconfidential" character of the subject of that observation, description or conclusion. To search for, segregate out and permit disclosure of such a descriptive passage in the attorney's report, as distinguished from some other form of "confidential communication" or "any advice . . . to a client" (Opp. Br. 8) in that report, is to indulge in precisely the type of fishing expedition midst the attorney's confidential communications to his client that the privilege was designed to outlaw. It is both impossible and dangerous to attempt to differentiate, in terms of confidentiality, between the descriptive and the advisory in the lawyer's opinion letter to his client. Even the most seemingly descriptive passages reflect upon communications made by the client and may have a confidential and advisory purpose or may reflect a legal conclusion or analysis respecting otherwise "nonconfidential" material.*

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* Indeed, it is highly possible that Friedland's statement that no "authorization" of the loan appeared in the minutes was directed to the regularity of the procedure followed in adopting petitioner's report to the union board rather than the presence or absence of any specific language in the board minutes.

It need only be added that the forced disclosure of this confidential communication from the attorney came about when the prosecutor, in his protracted attempt to invade the area of confidential communications created an aura of criminality which diverted the minds of the jurors from the true issues, caused the jurors to conclude that testimony which tended to exonerate the petitioner actually implicated him and caused the jurors to conclude that the claim of privilege was nothing more than a subterfuge designed to shield the petitioner from the sword of justice. The impact of the invasion of the privilege was plainly prejudicial and can only be described as resulting in a stain on the reputation of the federal courts for dispensing fair criminal justice. Only this Court can correct the egregious error.

2. The Solicitor General's Brief Confirms the Invalidity of the Indictment in Its Omission of an Essential Element of the Crime Charged

The Solicitor General does not attempt to argue that the indictment in this case specifically alleged in Counts 9 through 13 that petitioner had embezzled the funds of a labor organization "engaged in an industry affecting commerce." The Solicitor General in fact concedes that this necessary element of the crime was charged only by implication (Opp. Br. 10). This process of indicting by implication rather than by specific, clear and unambiguous language was rejected by this Court in *United States* v. *Hess,* 124 U.S. 483 (1888), and *United States* v. *Carll,* 105 U.S. 611 (1881).

The Solicitor General attempts to ignore the impact of those decisions in this case simply by stating that

Carll was a forgery case and then summarizing the particular defect in the indictment in that case. Obviously the facts in *Carll* differed from the facts in the instant case, but that does not make the holding of that case inapplicable.* As set forth more fully in the petition (Pet. 17-22) indictment by implication is impermissable in our judicial system.

3. The Solicitor General Misconstrues the Court of Appeals' Opinion and Thereby Fails To Refute Petitioner's Contention That He Was Required To Prove His Innocence

The Solicitor General contends that the Government met its burden of proof in this case when "it show[ed] a wrongful receipt of money belonging to [the union]. It [did] not have the burden of showing what the [petitioner] did with the money after he took it" (Opp. Br. 11).**

In the Court of Appeals one judge (Moore, C. J.) concluded that the Government could prove embezzlement by showing "either a lack of bona fide authorization or an absence of benefit to the labor organization from the expenditures" (Pet. 18a). For purposes of considering the sufficiency of the evidence on Counts 1 through 8, the other members of the panel (Friendly, Hays C. JJ.) accepted *arguendo* the validity of this construction of the statute. However, they questioned strongly this construction (Pet. 38a) and in fact necessarily rejected it with respect to the other counts by concluding that the Government was obliged to show that the petitioner had taken the union's money "knowing that the [union] would not have wanted that to be done" (Pet. 37a-38a). This construction by the majority of the court below necessarily required the *Government*—not the defendant—to show what happened to the funds in question.

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* The Solicitor General's attempted distinction of *Walker* v. *United States*, 342 F.2d 22 (5th Cir.) cert. denied 382 U.S. 859 (1965), is similarly defective.

** In support the Solicitor General cites *Doyle* v. *United States*, 318 F.2d 419 (8th Cir. 1963). In that case a union clerk was convicted of embezzling dues she had received from union members and appropriated to her own use. The defendant contended the Government was required to show an increase in her net worth or other evidence that she had in fact used the funds for her own benefit. The defendant there had no authority to deal with the funds of the union in a general fashion. Rather her job was simply to receive dues for the union account. In contrast the petitioner in this case was an important officer of the union involved and was authorized to deal generally with union funds.

The Solicitor General misconstrues the relationship of *In re Winship,* 397 U.S. 358 (1970) to this case. Petitioner does not contend that that case requires the Court of Appeals to apply the "reasonable doubt" standard as the Solicitor General erroneously states (Opp. Br. 11). Rather petitioner's contention is that the Court of Appeals' construction of the statute and its conclusion that the evidence in this case was sufficient to support a conviction under that construction has effectively shifted the burden of proof to the petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 58(2), petitioner files this petition for rehearing addressed to the order of this Court, entered on May 3, 1971, denying the petition for writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in this proceeding. As grounds for this rehearing request, petitioner states as follows:

1. The Grant of Certiorari in the Caldwell Case Makes Appropriate the Grant of Review in This Case.

On May 3, 1971, the day on which this Court denied the petition for certiorari in this case, certiorari was granted in No. 1114, *United States* v. *Caldwell.* In *Caldwell* the Court will be reviewing the Ninth Circuit's determination that a newspaper reporter has a privilege not to reveal confidential sources of news information, a privilege with First Amendment overtones so as to permit an invasion only upon the demonstration of "a compelling need." 434 F.2d 1081 at 1089.

While the instant case involves an examination of the scope and content of the attorney-client privilege, some of the same basic considerations of federal law enforcement policy are involved as will be before this Court when it considers the newspaper reporter's privilege in *Caldwell.* There are, of course, both similarities and dissimilarities between the two privileges; and the reporter's privilege touches upon First Amendment freedoms whereas the attorney-client privilege furthers the purposes of the Sixth Amendment. But the distinctions that exist between the two privileges will most certainly play a role in the dialogue that will occur before this Court in *Caldwell* and will serve to cast helpful light on the boundaries and the implications of the reporter's privilege.

The Ninth Circuit's opinion in *Caldwell* reveals some of the interrelationships between the two privileges. Speaking of the basic nature of the reporter's privilege, the court noted that "[u]nlike the relation between an attorney and his client or a physician and his patient, the relationships between journalists and news sources . . . are not rooted in any service the journalist can provide his informant apart from the publication of the information so obtained." 434 F.2d at 1088. And the Ninth Circuit, holding that the reporter's privilege depends upon the informant's continuing trust and confidence that the handling of his confidences has been discreet, felt that calling a reporter to testify behind closed doors as to such confidences creates fear and uncertainty in the informant's mind and leads to a loss of communication between informant and reporter—a "human reaction as reasonable to expect as that a client will leave a lawyer when his confidence is shaken." 434 F.2d at 1088.

The conceptual similarity of the two privileges, as well as their differences, amply justifies a reconsideration of the denial of certiorari in this case. Indeed, it would be quite appropriate for the Court to hear and consider the instant case at the time it accords plenary review of the *Caldwell* ruling. The relationships and the differences between the two privileges deserve full exploration by this Court. This exploration is appropriate, particularly since modern sophisticated surveillance techniques permit more ready invasion of these important inter-personal privileges.

2. The Second Circuit's Error in Creating a Dangerous Exception to the Attorney-Client Privilege Was Exacerbated by That Court's Failure To Effectuate Deletion of a Portion of Its Opinion Dealing With This Point.

In its *per curiam* opinion accompanying the denial of the petition for rehearing the Second Circuit ordered that one full paragraph of its opinion dealing with the attorney-client privilege be deleted. The purpose of that deletion was "[t]o avoid any . . . impression . . . that our opinion makes an exception to the attorney-client confidential communication rules." (Pet. 42a).

Unfortunately, the Second Circuit has not taken adequate steps to avoid the undesirable impression created by its opinion. Since the filing of the petition in this Court the opinion has been reported in the bound volume of 430 F.2d without any indication that the objectionable paragraph has been ordered deleted.

The critical significance of the "deleted" paragraph lies in its statement, which follows several references to Wigmore's classic treatise on evidence, that "The purpose of the privilege, the encouragement of full disclosure to the attorney in procuring legal advice, implies that a communication from an attorney is not privileged unless it has the effect of revealing a confidential communication from the client to the attorney." (Pet. 28a; 430 F.2d at 122). That notion that an attorney's comment or advice to a client is privileged only to the extent that it reflects or reveals a confidential communication from the client permeates the entire attitude of the Second Circuit, as well as of the Solicitor General, as to the basic nature of the attorney-client privilege. It is a notion that is legally and historically unwarranted and is flatly contradicted by Wigmore, on whom the Second Circuit purported to place great reliance. The "deleted" paragraph simply made express what was implicitly wrong with the remainder of the court's discussion of the privilege.

In the instant case, the client gave his attorney preexisting and non-privileged union minutes and sought his advice as to their legal adequacy; the attorney responded in critical part by stating that the minutes contained "no approval of this loan by the Executive Board." Under the Second Circuit's restrictive view, that statement by the attorney was not privileged since it did not reveal any confidential communication from the client, but simply described the condition of the non-privileged minutes.

But Wigmore makes plain that this statement falls squarely within the accepted and traditional formulation of the privilege. "Where the document already had an independent existence and the communication consists of bringing its contents to ***the attorney's knowledge,*** that *knowledge* is not to be disclosed by his testimony." 8 Wigmore, Evidence § 2307, p. 594 (original emphasis, McNaughton rev. 1961). As further stated in § 2308, pp. 595-596:

> "The client's disclosure to the attorney of the contents of a pre-existing document will almost always be an act of communication (§ 2306 *supra*)— i.e., a part of the matters voluntarily committed to the notice of the attorney. It is impossible, in the language of Mr. Justice Bronson, to perceive 'any solid distinction between the oral statement of a fact to counsel and a communication of the same fact by delivering to him a deed or other written instrument.' Unless, therefore, a particular communication of this sort is not confidential [because it was not communicated in confidence], it is within the privilege, and the testimony of the attorney on the stand cannot be required. Nor does it here make any difference that the client would have been compellable to produce the deed in chancery or otherwise, for he is also compellable to tell what he knows on other subjects, and yet his communications about them, made to the attorney, are privileged. The communication of the document is distinct from the document itself."

In other words, an attorney's *knowledge* about the contents of a document submitted to him by a client, be that document privileged or non-privileged, cannot be revealed without violating the privilege. The document itself may be producible, but not the attorney's knowledge of that document acquired in the course of the attorney-client relationship. That has been the interpretation of the privilege uniformly followed by courts heretofore. See, e.g., *In re Scranton Corp.*, 37 F.R.D. 465 (M.D. Pa. 1965) (memorandum of attorneys based on information supplied by client's counsel held privileged); *Crawford* v. *McKissack*, 1 Port. 433 (Ala. 1834) (indorsement on the bond in action had been obliterated; plaintiff's attorney held not compellable to state its tenor); *Donald* v. *Mitchell*, 43 Ill. 40, 45 (1867) (whether a promissory note, when handed to the attorney for bringing suit, was indorsed, held privileged); *Anonymous*, 8 Mass. (7 Tyng) 370 (1811) (court refused to compel attorney to disclose a document handed to him by client for use in litigation); *Gray* v. *Fox*, 43 No. 570 (1869) (testimony of attorney as to condition of notes when placed in his hands for litigation held privileged); *Brown* v. *Payson*, 6 N.H. 443, 448 (1833) (the situation and contents of a paper, delivered to an attorney for inspection in the course of his employment as attorney, held privileged); *Matthews* v. *Hoagland*, 48 N.J. Eq. 455, 21 Atl. 1054 (Ch. 1891) (whether a certificate, obtained from the client, was indorsed when the attorney saw it, held privileged); *Bulstrod* v. *Letchmere*, 2 Freem. Ch. 5, 22 Eng. Rep. 1019 (1676) ("the defendant being a counsellor at law shall not be bound to answer concerning any writings which he hath seen nor, for anything which he knoweth in the cause as a counsellor"); *Wheatley* v. *Williams*, 1 Mees. & Wels. 533, 150 Eng. Rep. 546 (Ex. 1836) (attorney not allowed to testify whether a paper shown in consultation bore a stamp; "all that appears on the face of such document is a part of the confidential communication").

The Second Circuit has indeed created an unfortunate precedent. That fact alone warrants consideration of the denial of certiorari. But such reconsideration becomes all the more imperative because of the failure to effectuate deletion of the most offensive part of its unprecedented ruling.

3. The Question as to Whether Petitioner Received a Fair Trial Justifies Both a Rehearing of the Denial and the Grant of Certiorari.

The fourth question raised in the petition for certiorari herein (Pet. 2) was whether the petitioner had received a fair trial by an impartial jury as guaranteed by the Fifth and Sixth Amendments. That question was not utilized in expressing the reasons why certiorari should be granted. But in accordance with Rule 58(2), that question is now advanced in support of rehearing as being among "other substantial grounds available to petitioner although not previously presented." The component parts of the fair trial question may be stated as follows:

A.

Petitioner was tried on an 18-count indictment and convicted by the jury on 16 of those counts. The Court of Appeals reversed convictions on 8 of those counts. In a petition for rehearing before that court, petitioner contended that the jury had been prejudiced in its consideration of this case by hearing and considering the voluminous evidence on the 8 counts which were reversed—evidence that was legally insufficient and could not be deemed proof beyond a reasonable doubt by reasonable men. By returning guilty verdicts on these counts, this particular jury indicated its tendency to overreact to otherwise insignificant prejudicial statements.

The trial record abounds with prosecutorial efforts to establish the defendant's domination and control of the activities of the two union locals in question. As all three members of the Court of Appeals panel recognized, "The danger in admitting evidence of this sort is that the jury may infer that the possession of such power is evidence of bad character." (Pet. 30a). The Court of Appeals has nevertheless indirectly acknowledged the validity of the defendant's contention—that the Government tried and won this case on the theory that the defendant was a "bad man."

A candid sensitivity to the "prosecutorial over-kill" reflected in the prosecutor's persistent recourse to prejudicial evidence compels, we submit, not a restrained expression of displeasure with the conduct of Government counsel, but reversal of the conviction on all counts.

B.

Throughout the trial the prosecutor engaged in a systematic course of character assassination directed at the petitioner. For example, he tried to portray petitioner as a cigar-smoking labor dictator reminiscent of Adolph Hitler (Tr. 285, 533-35, 1095). This allegation was cavalierly dismissed by the trial court as a mere "flight of eloquence". (Pet. 32a).

C.

Repeatedly the prosecutor asked his witness whether they would have testified without having been given immunity from prosecution. (Tr. 979, 1079, 1094A, 1100, 1102-1104). Through these questions the prosecutor effectively insinuated that the petitioner was part of a large group of "union criminals" who would only come forth to testify after being promised immunity.

D.

Finally, the prosecutor misled the jury into believing that petitioner was guilty of other crimes. Thus he cross-examined the character witnesses about defendant's prior arrests—arrests completely unrelated to this trial. The trial judge made no inquiry into the facts surrounding these alleged arrests and did not give the jury cautionary instructions at the times those questions were asked. Moreover, the trial judge refused to allow petitioner to bring out the circumstances of an alleged arrest for assault which had in fact resulted from an attack upon the petitioner by a gangster who charged petitioner with having assaulted him in response to petitioner's complaint. Although that charge had been summarily dismissed, as had the other charge which the prosecutor brought out, petitioner was precluded from explaining these circumstances to the jury. The combination of the prosecutor's insinuations and the trial judge's restrictions on presentation of the full explanation effectively created an erroneous and highly prejudicial picture of petitioner's character.

It is difficult for an appellate court to fully perceive the extent and cumulative impact of these events on the individual jurors. A barren and sterile written transcript can never effectively convey the emotional impact of a lawyer's trial tactics. Petitioner, however, observed these events first-hand; and petitioner suffered the consequences. Perhaps none of these errors taken individually is a sufficient reason for requiring a new trial, but the cumulative effect of all these factors is more than sufficient to indicate that petitioner was not afforded a fair trial in a calm, unemotional and reflective atmosphere. Our courts have been accurately described as "palladiums of liberty," *Illinois* v. *Allen*, 397 U.S. 337, 346 (1970), and therefore defendants are required to behave with dignity and restraint. *Id.* Necessarily there is a greater burden on the government to try its cases without exaggerated appeals to human emotions and prejudices. In this case the prosecutor violated that basic standard and thereby deprived petitioner of a fair trial. In such circumstances the petition for a writ of certiorari should be granted.

CONCLUSION

The order denying the writ of certiorari should be vacated and the writ should be granted.

Respectfully submitted,

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May, 1971

CERTIFICATE

Counsel hereby certifies that this petition for rehearing of the order denying certiorari is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

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Attorney for Petitioner